FILE COPY.

OFFICE OF THE CLERK
RECEIVED
MAR 5 1906
SUPREME COURT U.S.

No. 888. 74

Supreme Court of the United States.

JAMES B. HOWARD, - - - - Plaintiff in Error,

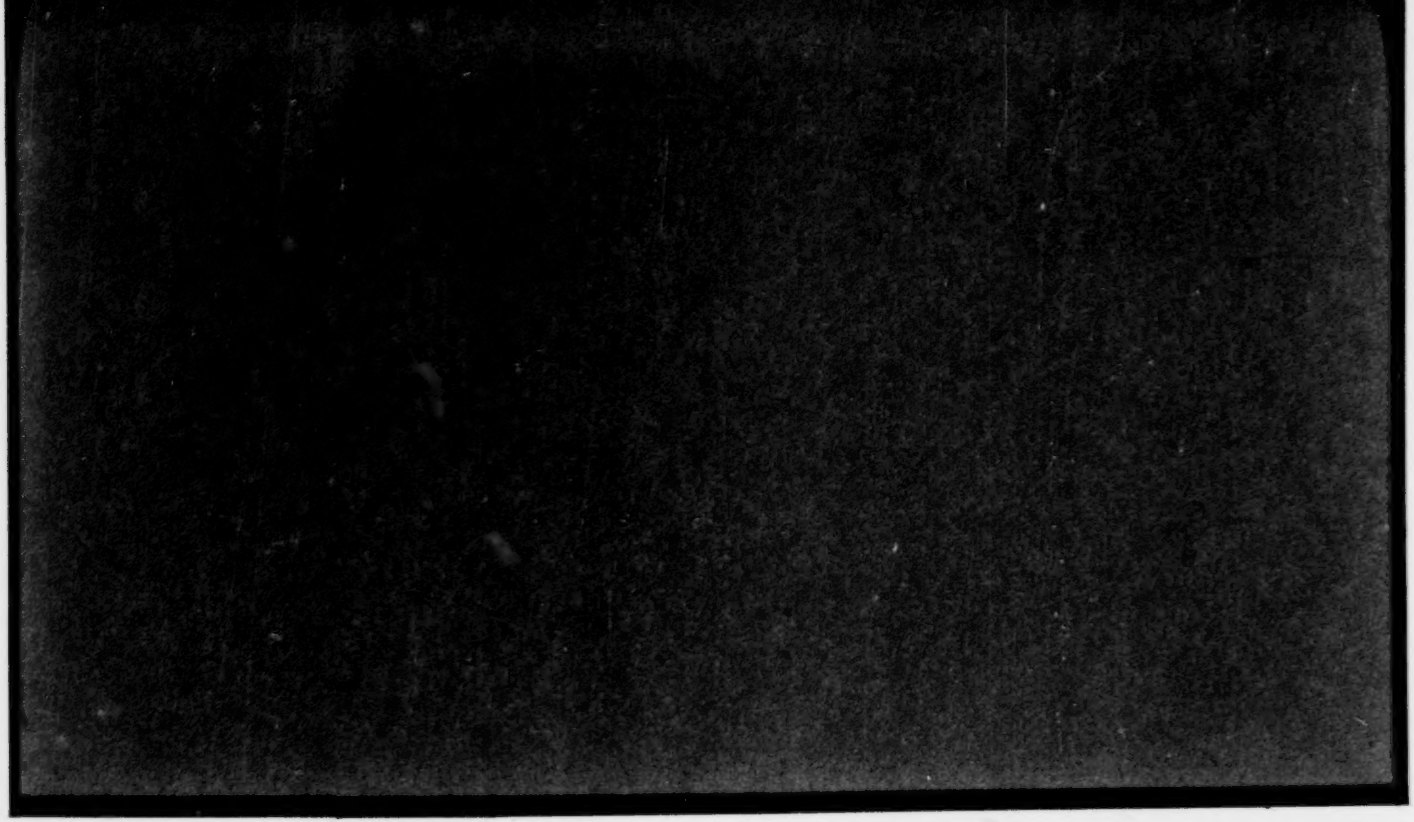
vs.

THE COMMONWEALTH OF KENTUCKY, - Defendant in Error.

PETITION FOR REHEARING.

W. M. SMITH,
Attorney for Plaintiff in Error.

F. C. HERRMANN PRESS, LOUISVILLE, KY.



No. 388.

SUPREME COURT OF THE UNITED STATES.

JAMES B. HOWARD, - - - - *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

PETITION FOR REHEARING.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, plaintiff in error in the above entitled case, respectfully prays for an order directing a reargument of said case upon the following grounds:

First. Because of the extreme importance and far reaching effect, as far as plaintiff in error is concerned, of the decision which has been announced as bearing upon some of the most fundamental principles of Constitutional Law.

Second. The novelty of the question discussed and of the points necessarily determined by the judgment, and plaintiff in error believes and is advised by counsel that a further consideration of this case will lead this honorable court to a decision contrary to that heretofore rendered, and a more favorable determination to this plaintiff in error.

Third. It is submitted that by the Common Law which has been adopted by the Constitution and Statutes of the State of Kentucky, the accused has not only the right to be present, but must be present during the whole of the trial, and that his presence is not only an inalienable right, but a jurisdictional fact that can not be waived.

Fourth. That conceding that this right of presence during trial is a fundamental right, that same can not be violated even by a State Constitutional provision, much less by a statute, or the decision of a court.

Fifth. It is respectfully submitted that there are inviolable rights that are attached to citizenship that can not be waived, and that these rights have been recognized by this honorable court regardless of the construction of any State Statute or Local Law.

Sixth. That while it is true that this honorable court does not and will not undertake to regulate the administration of the criminal law in any State of the Union, yet it will protect the inalienable rights of citizens as against any infringement, violation or abridgment, and that this protection extends not only as against the constituted authorities, but the right of the prisoner himself, even by advice of counsel to waive.

Seventh. It is respectfully submitted that this is not an issue with the highest court of the State as to its construction, but a question as to whether or not any law can intervene in the matter of these rights regardless of surrounding circumstances or conditions.

Eighth. If it be conceded that human rights exist that can not be violated or waived, then it is submitted that State Statutes, the construction of which interfere therewith, will not be sustained by this honorable court, although sanctioned by usages of States, or the highest decision of the courts thereof, otherwise, these rights cease to be inalienable and become the subject of legislation or construction, contrary to the settled and established principles of the law, and the existence of human rights.

Ninth. The question presented is not considered as one of the decisions of the highest court of the State of its

statutory law, that perhaps would be final as far as this honorable court is concerned, or a question of practice that might be waived by the prisoner under advice of counsel, but a pure and simple question of an inalienable right made sacred and secure by reason of necessity, and such a right that the Fourteenth Amendment in its most limited construction necessarily protects.

And your petitioner, plaintiff in error, respectfully asks for a careful consideration of the paper annexed in which an attempt is made to more fully state and support the grounds above mentioned with such brevity as the nature of the case will admit, and he prays that his case be set down for reargument before this court upon some day to be appointed.

And as in duty bound, will ever pray.

W. M. SMITH,
Attorney for Plaintiff in Error.

I certify that, in my opinion, the foregoing petition for rehearing is well founded.

W. M. SMITH.

GROUNDS UPON WHICH THE REARGUMENT IS ASKED.

First. By the Magna Charta heretofore quoted at length in briefs filed in this case, in our opinion it fully appears that this right of presence during the trial is an inalienable right, that is, a right that can not be violated by any law of the land, and which right is protected by the Fourteenth Amendment; that this right can not be waived is established by Judge Brannon in his work on the Fourteenth Amendment, Cooley's "Constitutional Limitation," and various other text authorities cited. The case in this court of Michael Schwab vs. A. W. Berggren, 143 U. S. 442 (36-218), Lewis vs. The United States, 146

U. S. 370 (36-1012), and the case of Hopt vs. The People of Utah, 110 U. S. 574 (28-265), seem to be conclusive of the proposition.

Second. If it be conceded as it seems to have been in the opinion heretofore rendered in this case, that the right herein asserted is an inalienable right, and as determined in the Hopt decision, that that right can not be waived, it is insisted earnestly that under the decision in Rogers vs. State of Alabama, decided by this court January 18, 1904, (No. 407), that a State Statute which violates such a right would not be sustained by this court.

Third. If it be a fact that the presence of the accused, which by all the accepted authorities seems to be necessary during every material step taken in his case, constitutes a jurisdictional fact, then no matter what a State Court may determine, same is not binding if this jurisdictional fact is shown to be wanting. If the State Court had jurisdiction of the person of the accused, its decision might be binding, but if that jurisdiction is wanting, then the court has no power to act and its decision imposing a penalty is without authority, and its enforcement as against the accused is a violation of his rights, which are protected by the Fourteenth Amendment. The premises conceded this contention is not in conflict with the case *in re* Converse, 137 U. S. The jurisdiction is lost whenever a material step is taken in a prosecution for a felony in the absence of the accused, regardless of whether or not that absence occurs with or without his consent. It is the duty of the State to see that he is present and, if not, to take no further step in the proceedings until such presence is secured. This is not only a right, but a duty that has existed from time immemorial, and no State in the Union recognizes that duty more fully and completely than do the laws of the State of

Kentucky, but, regardless of State laws, this right exists and this duty is imposed and can not be disregarded.

Fourth. It is insisted that by reason of Section 281 of the Criminal Code of practice of the State of Kentucky, that the plaintiff in error is deprived of the right to complain herein. It is submitted, however, as a legal proposition, that if the right be an inalienable right as determined by this court, it can not be violated, even by a State Constitutional provision, much less a statutory enactment or a construction thereof, and that if the presence is a jurisdictional fact, any action during the absence of the accused under any condition is void, and the subsequent proceedings adjudging any penalty is a violation of the rights of the accused, such rights as are protected by the Fourteenth Amendment.

Fifth. Succinctly stated, the contention of plaintiff in error, is:

1. That the right asserted to be present during the entire trial when any material step therein is taken, is an inalienable right.

2. That this right must be protected by the court and can not be waived by the defendant.

3. That such presence is a jurisdictional fact, and any proceedings had in a felony case during the absence of the accused, renders the entire proceeding void, and the attempt to enforce any punishment adjudged therein is a violation of the rights of the accused.

6. These propositions, as above contended for, are thought to be elementary, and without exception they are believed to be sustained by every text book, and certainly as to some by this honorable court, especially by the Hopt case The reason of the law is apparent, common justice pleads for such an interpretation, and humanity requires it.

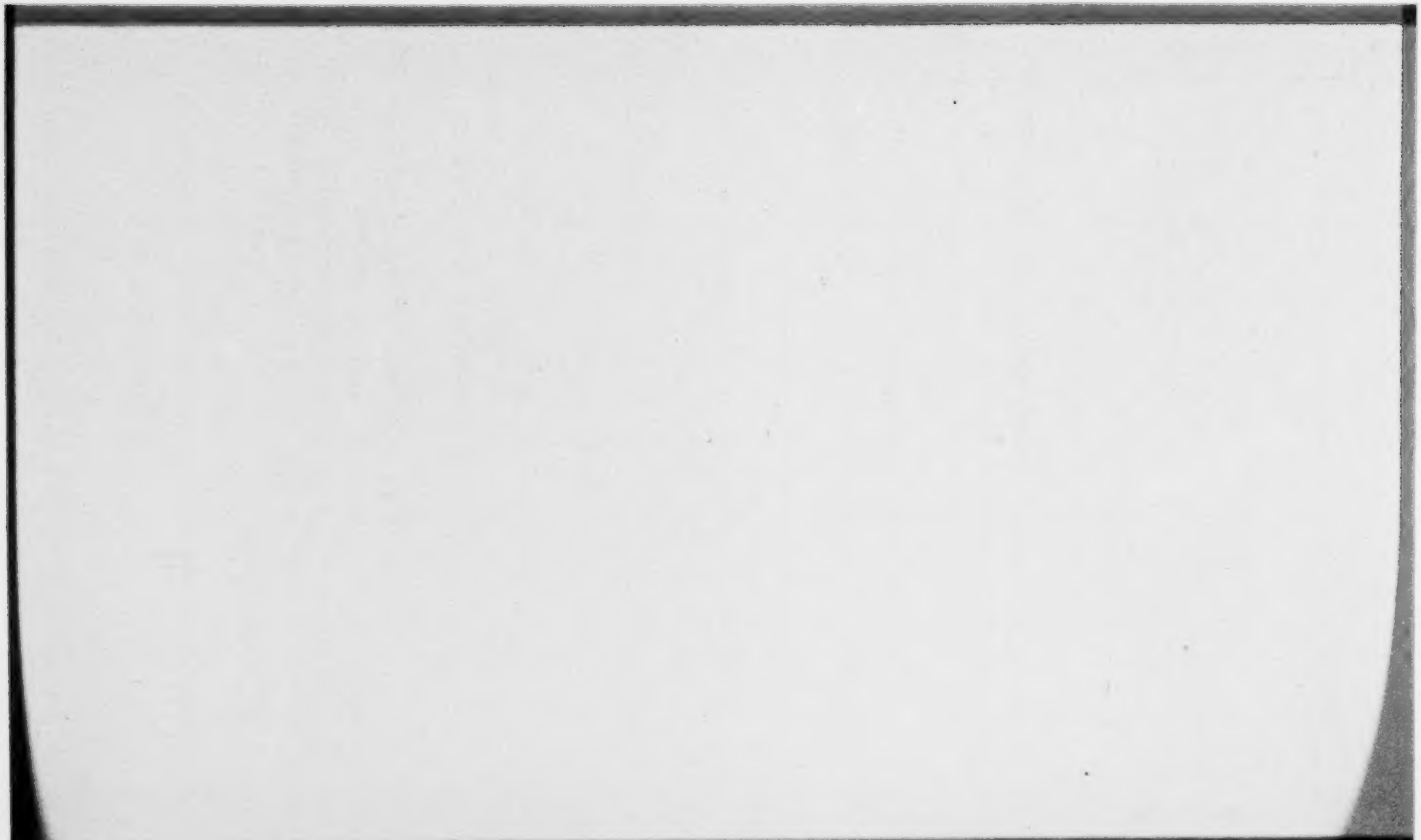
To say that an accused, charged with felony, may waive a right or consent to a conviction under plea of not guilty, is to place the credulous and timid at a disadvantage that no just administration of the law will sanction.

7. It is insisted, however, that accepting all of these propositions as true, plaintiff in error is not entitled to complain herein, because although a juror accepted by both parties was without just cause in the absence of the accused, excused by the court, that still if he finally obtained a jury that gave him a fair and impartial trial resulting, however, in a conviction, that he has not been prejudiced thereby. It is a principle of law so well established that new authorities thereon have ceased, that when a material right of the defendant is violated, that a conclusive presumption arises that he was prejudiced thereby. Not only the decisions of the State of Kentucky, but the fundamental statutory law recognizes this principle, and the direct question where a juror accepted and has been excused, has been decided by the courts of the State, and in the case of Crowley vs. The United States, recently determined, this honorable court has recognized this doctrine, and it is not thought necessary to argue or cite authorities to sustain the proposition that where a known right has been violated that the accused must establish the fact that he has been prejudiced in order to obtain redress.

Respectfully submitted,

W. M. SMITH,

Attorney for James B. Howard, Plaintiff in Error.



FILE COPY.

Office Supreme Court U. S.
FILED
AUG 14 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905

NO. 238-47

JAMES B. HOWARD, ... Plaintiff in Error,
versus
THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief of N. B. HAYS, on behalf of the Commonwealth.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

Geo. A. Lewis Publishing House Print.

INDEX.

BRIEF.

	Page.
Order discharging J. C. Alexander	2
Affidavit of Ben Hackett	3
Bill of exceptions on the discharge of Alexander	5
Motion and reasons for a new trial	6
Opinion of Kentucky Court of Appeals	10
Dissenting opinion of Judge O'Rear	22
Motion for rehearing	23
Petition for rehearing	26
Assignment of errors	29
Question	35
Citizenship	35
The fifth and sixth amendments of the Constitution of the U. S.	36
Discretion of the trial court	40
Jury trial	43
Discharge of J. C. Alexander, no error	44
The first error	49
No question for review	57
No Federal question presented	61
An impartial jury	64
Hopt v. Utah, case	67
Trial of challenge of Alexander in presence of defendant	70
The right of appeal not a constitutional right	72
Jurisdiction of Kentucky Court of Appeals	76
Record must show objection and exception	79

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, Defendant in Error.

BRIEF FOR COMMONWEALTH OF KENTUCKY.

On January 30th, 1900, Hon. William Goebel, while on his way to the Senate Chamber, in Frankfort, Franklin county, Kentucky, was shot on the State Capitol grounds, by an assassin, concealed in the Executive building, located thereon.

He died from the effects of said gun-shot wound, on February 3rd, 1900.

On April 17th, 1900, the plaintiff in error, together with others, was indicted by the grand jury of Franklin county, Kentucky, for the willful murder of said Goebel.

(R., 1.)

Plaintiff in error was tried and convicted in 1900, and his punishment fixed at death. He prosecuted an appeal to the Kentucky Court of Appeals, and obtained a reversal of said judgment.

(Howard v. Commonwealth, 110 Ky., 356.)

He was tried and convicted the second time in 1902, and his punishment was fixed at confinement in the penitentiary for life. He prosecuted a like appeal and obtained a like reversal.

(Howard v. Commonwealth, 114 Ky., 372.)

He was tried and convicted the third time in April, 1903, and his punishment on this trial was fixed at confinement in the State penitentiary for life. He filed motion and reasons for a new trial (R., 47), which motion was overruled; and from which ruling of the Court, he prosecuted an appeal to the Kentucky Court of Appeals.

During the trial, the Commonwealth challenged the juror, Alexander, for cause after he had been tested and accepted by both parties, but before the jury was sworn. The Court having sustained said challenge and discharged said Alexander over the objection of plaintiff in error, the same is relied on by plaintiff in error for review here. The special bill of exceptions as to the same, and the orders of the trial court, are as follows:

"COMMONWEALTH OF KENTUCKY, Plaintiff,
"VERSUS } Order.
"JAMES B. HOWARD, Defendant.

"Commonwealth's attorney Franklin came into the Court, and — the presence of the accused and his counsel, stated that he had a matter he desired to bring to the attention of the Court, away from the presence of the jury. *Thereupon the Court, counsel for the Commonwealth, the defendant in person, and his counsel retired to the county judge's office.* Thereupon the attorney for the Commonwealth filed the affidavit of Ben F. Hackett, and for reasons therein shown, moved the Court to discharge juror

J. C. Alexander from service as a juror on the trial of this case, *to which motion defendant by counsel objected and argument of counsel on both sides being heard upon the objection it was agreed by counsel on either side that the Court might, in the absence of defendant and counsel, question the said Alexander as to the truth of the statements contained in said Hackett's affidavit,* that he said to Hackett while in the custody of the sheriff, 'Hello, Ben, I am glad they cut you off of this jury as I did not want to serve on this jury with you,' and the said Alexander having admitted the truth of said statement, but claimed the said statement was made in a jocular way, and the Court being of the opinion that such conduct on the part of Alexander was a violation of the admonition of the Court, when he was placed in the custody of the sheriff, it was ordered and adjudged that said Alexander be, and he is now, excused as a juror in this case, and he is now ordered to be discharged; and the Court being thus advised, *overruled defendant's objection, and discharged and excused said Alexander, and defendant by counsel excepts.* Thereupon the *defendant* moved the Court to discharge the entire panel remaining, which was objected to by attorney for the Commonwealth, and the Court being advised, sustained said objection and refused to discharge said entire panel remaining, to which ruling defendant by counsel excepts."

(R., 32.)

The affidavit referred to reads as follows:

"COMMONWEALTH OF KENTUCKY,
"VERSUS
"JAMES B. HOWARD.
} Affidavit of Ben Hackett.

"This affiant, Ben Hackett, says that after the killing of William Goebel, he and Mr. J. C. Alexander, who had been accepted on the jury to try the case, had many conversations and arguments about

the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel among those — were charged with this murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him; these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel, were frequent and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.

"This affiant further says that on yesterday afternoon late, after Mr. Alexander had been accepted as a juror to try the case and after the affiant had been excused—after those accepted as jurors had been charged and admonished by the Court and immediately after the adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett says the foregoing statements are true.

"BEN HACKETT.

"Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

"JAS. H. POLSGROVE,
"Co. Judge Franklin Co."

(R., 32, 33.)

The bill of exceptions on said challenge is as follows:

"Franklin Circuit Court.

"COMMONWEALTH OF KENTUCKY, Plaintiff,
"VERSUS
"JAMES B. HOWARD, Defendant.
} Bill of Exceptions.

"Be it remembered:

"That on the trial of this case on the 10th day of April, 1903, there had been tested and accepted by both Commonwealth and defendant herein, eleven jurors, *J. C. Alexander* being one of them, and the twelfth juror had been called and qualified himself as a competent juror.

"Thereupon the Commonwealth's attorney, together with the attorney assisting him in said prosecution, withdrew for the purpose of consulting as to the acceptance of the twelfth juror, and afterwards returned into Court and filed the affidavit of Ben Hackett, which is as follows:

* * * "The affiant, Ben Hackett, says that after the killing of William Goebel he and *Mr. J. C. Alexander, who has been accepted on the jury to try this case, had many conversations and arguments about the said killing, this affiant expressing and urging the opinion that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Mr. Alexander expressing and urging the opinion that there had not been a conspiracy at all to murder him—these arguments and conversations occurred at different times and places in Woodford county during the time that has elapsed since the murder of Mr. Goebel—were frequent, and much earnest interest and feeling was expressed by both this affiant and Mr. Alexander therein.*

"This affiant further says that on yesterday afternoon late after Mr. Alexander had been accepted as a juror to try the case and after this affiant had been excused, after those accepted *as jurors had been charged and admonished by the Court, immediately after the adjournment for supper and as the jury was being conducted by the sheriff away from the court house, affiant by accident met the jury as they were*

passing out through the court house yard, when in passing Mr. Alexander said to this affiant, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Affiant Ben Hackett, says the foregoing statements are true.

(Signed) "BEN. F. HACKETT.

"Subscribed and sworn to before me by Ben Hackett, this April 10, 1903.

"JAS. H. POLSGROVE,
"Co. Judge Franklin Co.

"And moved the Court for *reasons* shown in said affidavit to discharge said *J. C. Alexander* from service as a juror on the trial of this case, to which *the defendant by counsel at the time objected and the Court overruled said objection and discharged said Alexander from service as a juror herein, to which defendant at the time excepted, and still excepts.* That at the time said motion was entered, and said Alexander was so discharged, the Commonwealth had exhausted of its peremptory challenges three, and the defendant had exhausted of his peremptory challenges twelve. *That on said motion to discharge said Alexander, and before he was discharged by agreement with counsel on either side, the Court privately examined said Alexander as to the truth of the* CHARGES *as to what he said, to said Hackett while he, Alexander, was in the custody of the sheriff; and the Court thereupon being advised, discharged said Alexander as stated,* to all said rulings of the Court defendant objected and excepted, and objects and excepts, and files this said bill of exceptions, duly signed and approved by the Court.

"JAMES E. CANTRILL, Judge."

(R., 33, 34, 35.)

Said motion and reason for a new trial, are as follows:

"Defendant, James Howard, moves the Court to set aside the verdict herein and grant him a new trial, because he says his substantial rights have been prejudiced herein by reason of the following errors

committed and proceeding had upon his trial, to-wit:

"1st. Because the Court erred in overruling the motion of defendant made herein to require that the one hundred and fifty jurors ordered to be summoned from the county of Woodford, be drawn from the wheel or drum in said county as is required by law in the selection of jurors in said county when the regular panel is exhausted, to which ruling the defendant at the time excepted.

"2nd. Because the Court erred in discharging and excusing J. C. Alexander for service herein as juror after he had been accepted, and also in overruling the motion then made by defendant herein to discharge the entire panel so far as then accepted, to all of which the defendant at the time excepted.

"3rd. Because the Court erred in overruling defendant's motion made herein on April 15th, 1903, to set aside the swearing of the jury, and continue the case to the next term of the Court, to which the defendant at the time excepted.

"4th. Because the Court erred in overruling the defendant's motion to permit him to re-examine witness Henry E. Youtsey, who had been sworn and testified in this case as a witness for the Commonwealth.

"5th. Because the Court erred in overruling the motion to strike from testimony of various witnesses heard herein, certain testimony and statement set out in said motion, to which defendant excepted.

"6th. Because the Court erred in overruling motion of defendant herein to strike from the testimony of Henry E. Youtsey, witness heard herein, certain testimony and statement fully set forth in said motion, to which the defendant excepted.

"7th. Because the Court erred in overruling motion of defendant to exclude and withdraw from

the jury certain statement, testimony of witnesses Chas. Day and D. A. Jones, to which defendant excepted.

"8th. Because the Court erred in failing and refusing to give the jury instructions Nos. one, two, three, four and five offered by defendant herein, and in failing and refusing to give each and every one of said instructions, to all of which defendant at the time excepted.

"9th. Because the Court erred in giving to the jury, over defendant's objection and exceptions, instruction Nos. one, two, three, four and five, and each and every one of said instructions, to all of which the defendant at the time excepted.

"10th. Because the Court erred in permitting Hon. Thos. Campbell, one of the attorneys for the prosecution, to state to the jury in his argument that there had been previous trials in this case, and in referring to the verdicts that were rendered on said trials, and upon objection being made by defendant's attorneys to said statement and argument, the Court erred in failing to tell the jury to disregard the same, and in not withdrawing same from them, to all of which the defendant at the time excepted.

"11th. Because the Court erred in permitting Hon. Robert Franklin, the Commonwealth's attorney, to state to the jury in his concluding argument as follows: 'Jim,'—meaning the defendant—'you have always been the tool of John G. White and Bev. White, and you are the tool of them now.' To which the defendant at the time excepted, and the Court erred in failing to exclude said statement from the jury, and charging them to disregard said statement.

"12th. Because the Court erred in permitting the Commonwealth to introduce and have sworn Henry E. Youtsey as a witness herein, and in permitting him to testify herein, when his name was not at the foot of the indictment and was not called when the wit-

nesses were called and placed under the rule, and not put upon the stand until all of the witnesses for the Commonwealth in chief had testified except one.

"13th. Because the Court erred in overruling the motion of defendant to exclude certain statement in the testimony of Frank Cecil, a witness herein, which statements are fully set forth in the motion of defendant filed in this case, and to the overruling of which motion the defendant at the time excepted.

"14th. Because the Court erred in admitting the testimony of various witnesses sworn herein, which statement and testimony was objected to at the time by the defendant, and exceptions reserved, which is fully shown by a stenographic report of the evidence herein, and the Court erred in excluding testimony and statement of certain witnesses offered herein by the defendant and to which ruling of the Court the defendant excepted, as is shown by said stenographic report of the testimony.

"15th. Because the Court erred in overruling the motion of defendant to require the Commonwealth's attorney to permit the defendant or his attorney to examine the written statement called the confession of Henry E. Youtsey, and the notes of the evidence given before the grand jury, or to furnish them a copy of same.

"16th. Because the verdict herein is against the law and the evidence heard in the case.

"17th. Because the Court erred in failing to give the jury the whole law of the case as applicable to the charge made and the evidence heard herein.

"18th. Because the Court erred in failing to instruct the jury to the extent and the circumstances under which evidence all acts and declarations of co-conspirators were to be received against the accused, or how far or under what circumstances the

jury could consider such testimony of the acts and doings of co-conspirators as against the defendant.

"19th. Because the Court erred in ruling that the party, Green Golden, introduced as a witness in behalf of the defendant could not be compelled to testify in the case, and in refusing to permit the defendant's attorneys to interrogate said witness as to any matter relative to the case, and especially the facts set out in the bill of exceptions filed herein on April 23rd, 1903.

"20th. Because the Court erred in refusing to permit the defendant's attorney to examine the witness, Mrs. H. E. Youtsey, and in refusing to permit her to testify in the case, she being introduced and sworn in behalf of the defendant herein, to which the defendant at the time excepted.

"21st. And finally the defendant moves the Court to set aside the verdict herein and to grant him a new trial because he says he has not had a fair and impartial trial for the following additional reasons:

"That the defendant was misled and prevented from procuring an impartial, unprejudicious and competent jury for the trial of his case, by the answers and statements of Runyon Renshaw and Carter C. Neal, upon the examination for qualifications of jurors."

(R., 47.)

And which answers and certain affidavits are shown in full in the record on pages 50 to 60, inclusive, of the transcript of record.

Said judgment was affirmed by the Court of Appeals, on April 22, 1904, and is as follows:

"*Opinion of the Court by Judge Settle.*

"The appellant, James B. Howard, was tried and

convicted the third time in the Franklin Circuit Court under an indictment returned in that Court against him and others, charging them with the murder of William Goebel, and his punishment fixed by the verdict of the jury and sentence of the Court at imprisonment in the penitentiary for life.

"His motion for a new trial was overruled by the lower court, and by this appeal he seeks a reversal of the judgment of conviction.

"There have been two former appeals herein. (See Howard v. Commonwealth, 22 L. R., 1845; Same v. Same, 24 L. R., 1225.) As the principal facts connected with the crime for which appellant was convicted were stated and commented on in the opinions of this Court on the former appeals, we deem it unnecessary to enter upon a recital of them in this opinion. Suffice it to say that the evidence shows that Hon. William Goebel, on January 30th, 1900, in Frankfort, and on the Capitol square, while approaching the main entrance of the State House, was shot and wounded by some one in concealment, of which wound he in a short time thereafter died. It has been and is the theory of counsel for the Commonwealth that the bullet which deprived him of his life was fired by the appellant, though others are charged and jointly indicted with him as aiders and abettors in the crime.

"There were 21 grounds for a new trial filed by appellant in the lower Court, several of which were relied on by him on the former appeals, and were then held by this Court insufficient to authorize a reversal. It will, therefore, be unnecessary for us to again consider such of them as were then determined. Indeed we feel called upon to discuss and pass upon only such of the grounds for reversal as were urged by counsel for appellant in argument before us, and will consider them in the order in which they were presented.

"First. It is contended that the Court erred in the formation of the jury, in that by its order for the

summoning of 150 jurors from the county of Woodford, it was not required that they be drawn from the jury wheel or drum of that county, but only that they be summoned from the county at large by the sheriffs of Franklin county.

"In Curtis v. Commonwealth, 23 L. R., 267, it was held that the manner of selecting the jury in that case was error, but as section 281 of the Criminal Code of Practice provides that, 'The decisions of the Court upon challenges to the panel and for cause, upon motions to set aside an indictment, and upon motion for a new trial, shall not be subject to exception,' this Court is without power to revise such an error. In several cases subsequently decided, the most recent being that of Turner v. Commonwealth, the opinion in which is yet unpublished, the rule announced in Curtis v. Commonwealth, *supra*, was adhered to and approved. We find it unnecessary, therefore, to decide whether or not there was error in the manner of summoning the jury or in its formation, as a reversal by this Court upon that ground, even if such error had been committed, would be unauthorized. Another alleged error complained of by appellant was the discharge by the trial Court of the juror J. C. Alexander.

"It appears that he and ten others had been accepted by the parties as jurors, and that but one other was to be selected in order to complete the panel of twelve. The Commonwealth had then exhausted three of its peremptory challenges, and the appellant twelve of his, though neither party had been required to, or had, exercised the right of peremptory challenge, except as there were twelve men in the jury box, who had upon the *voir dire* been found qualified. At this point it was suggested to the Court by the Commonwealth's attorney, out of the hearing of the jury, that had thus been partly made up, that he had just received information to the effect that J. C. Alexander had theretofore formed and expressed an opinion as to the merits of this case, and

with respect to the crime charged in the indictment, and had after he was accepted on the jury, improperly conversed with a person, not a member of the jury, on a subject connected with the case, notwithstanding the previous admonition of the Court not to do so. This communication of the Commonwealth's attorney was immediately followed by a motion from him to discharge Alexander from the jury, in support of which was filed the affidavit of Ben. Hackett, who had himself been excused as a juror in the case.

"It was stated in the affidavit, in substance, that the affiant and Alexander, after the death of William Goebel, had many conversations and arguments about the killing, in which affiant contended that there had been a conspiracy to murder Goebel, among those who were charged with his murder, and Alexander expressed and urged the opinion that there had not been such a conspiracy. That in these conversations both affiant and Alexander manifested much earnest interest and feeling. And further, that after Alexander and some other members of the jury had been accepted, put in charge of the sheriff and admonished by the Court, he said to the affiant. after adjournment on the day before the filing of the affidavit and as the jury were passing out through the court house yard, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you.'

"Before passing upon the motion of the Commonwealth's attorney, the Court privately examined Alexander, while the latter was in the custody of the sheriff, touching the truth of the charges contained in the affidavit of Hackett, and as the result of such examination, discharged him from the jury. It was stated by counsel for the Commonwealth in the oral argument and by brief in this Court, and not denied in the oral argument or brief of counsel for appellant, that the examination of Alexander was conducted privately by the Court *at the request of coun-*

sel for appellant, made in the latter's presence and with his consent. Be that as it may, in ascertaining what transpired in the lower court in this case, we must look to and be governed by the record made therein, and it appears from the record that the privy examination of Alexander was made by consent of the parties, though it further appears that appellant at the time of the discharge of Alexander, excepted to such discharge, and moved the Court to also discharge the ten persons remaining of the jury, which the Court refused to do, but proceeded to complete the jury, subject to the right of challenge by either party to the extent of the challenges remaining to them, by selecting from the persons summoned from Woodford county for that purpose the two necessary to complete the panel of twelve.

"As what occurred in the privy examination of Alexander does not appear in the bill of exceptions, we are unable to know whether he admitted or denied the statements made in the affidavit of Hackett, except that it does appear in the bill of exceptions that he made the admission—presumably before the privy examination—that he said to Hackett after the latter had been excused from the jury, and he had been accepted as a member thereof, 'Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you,' but claimed that it was made in a jocular way.

"It is insisted for the Commonwealth that Alexander's admission as to the above statement warrants the conclusion that what was said in the affidavit of Hackett, as to arguments between Alexander and himself, involving the merits of this case, is true, otherwise what reason did Alexander have for not wishing to serve with Hackett on the jury?

"In this view of the matter it is argued that the action of the lower court, in discharging Alexander from the jury, was not an abuse of discretion. Upon the other hand, it is insisted for appellant that it was error for the Court to examine Alexander in

his absence, and that he could not legally waive his right to be present at such examination. In support of this contention section 183, Criminal Code, is relied on, which provides: 'If the indictment be for a felony, the defendant must be present and shall remain in actual custody during the trial.' * * *

"While this Court in construing the section, *supra*, has repeatedly held that one charged with the commission of a felony can not be tried during his absence from the court room, we find that cases have arisen in which it has been deemed necessary to relax that rule. Thus in Hite v. Commonwealth, 14 L. R., 308, it was held that the occasional absence from the court room of the accused, on account of temporary illness for a new minutes at a time, the trial continuing in his absence, did not prejudice the substantial rights of the accused. In Meece v. Commonwealth, 78 Ky., 586, it appeared that after the submission of the case to the jury and their retirement to the jury room they returned into Court and asked for further instructions. The Court declined to give any, but in the presence of counsel for the prisoner inserted by interlineation certain words in one of the instructions. The accused was absent at the time, and it was urged in his behalf that for this reason the judgment should have been reversed. This Court, however, held otherwise, in doing which it said:

"'While we recognize the fact that the accused when on trial for a criminal offense should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence, either before or after the submission of the cause to the jury, still this Court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the Court below, and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged

with a criminal offense has the constitutional right to be tried by a jury, the right of appeal from the verdict and judgment against him does not exist, except by the legislation of the State on the subject, and when permitting an appeal the law-making power has the right to determine for what cause a reversal may be had.' * * *

"It has also been held by this Court that a trial for felony begins when the jury is sworn. (Willis v. Commonwealth, 86 Ky., 68.) At the time the examination of Alexander took place, and when he was discharged, the jury had not only not been sworn, but it had not been completed. There are many rights, some of them guaranteed by the Constitution, which one charged with a crime may not waive, and should not be permitted by the courts to waive. Such as the right of trial by jury, the right to be heard by himself and counsel, to demand the nature and the cause of the accusation against him, and yet others, the assertion of which may unexpectedly become necessary for his protection during the progress of the trial. But we are unwilling to say that one charged with felony, and being in Court as was the appellant, with counsel at hand ready and competent to advise him of his rights, may not, in advance of the swearing of the jury, and before he is placed in jeopardy, consent to a private examination by the Court of a juror against whom complaint had been made, for the purpose of ascertaining whether he was qualified to retain his place as one of the jurors to try the case. Nor do we think it is affirmatively shown by the record in this case that any injury resulted to the substantial rights of the appellant by Alexander's dismissal from the jury.

"It is, however, beyond our province to reverse this case for error, if there were any, in excluding Alexander from the jury. Our right to do so is expressly forbidden by section 281 of the Criminal Code, and we have already referred to Curtis v. Commonwealth, 23 L. R., 267, and Turner v. Com-

monwealth (yet unpublished) to indicate this Court's construction of that section. In addition to those cases, a further recent authoritative utterance of this Court to the same effect will be found in Alderson v. Commonwealth, 25 L. R., 32, in which one of the grounds for reversal, as set forth in the record, was that the appellant, over his objection at the time, was forced by the trial court to accept as jurymen persons alleged to have formed an opinon as to his guilt or innocence.

"Another alleged error was that after the Commonwealth had accepted in open court the full panel of twelve jurymen, and after they had been passed to the appellant for acceptance or peremptory challenge, and he and his counsel had retired from the court house to pass upon the panel, the Court over appellant's objection permitted the Commonwealth to object to and excuse one of the jurymen without cause, though the whole twelve had been accepted by it. Whereupon appellant, as was done in the case at bar, moved the Court to dismiss the entire jury, which motion was overruled. In passing on the question thus presented this Court, after quoting section 281 of the Criminal Code, *supra*, said:

"'In construing this section we have uniformly held that errors in the manner in which the jury were selected, or that a juror lacked the statutory qualifications, shall not be considered on appeal.'

"Whatever may be the rule in other States, this question has been settled in Kentucky as herein indicated, and the authorities cited are the latest that have emanated from this Court.

"Another complaint of the appellant is the refusal of the lower court to require the Commonwealth's attorney to permit him to examine an alleged original statement called the confession of H. E. Youtsey, and the notes of the evidence given by him before the grand jury. The motion of appellant for those papers was based upon his affidavit. A response to the motion was filed by the Common-

wealth's attorney, in which it was denied that he had, or knew anything of the alleged confession, but that he did have notes of Youtsey's testimony before the grand jury, which he refused to surrender. The Court ruled correctly in refusing to require the surrender by the Commonwealth's attorney of the notes of Youtsey's testimony given before the grand jury, as was decided by this Court in Franklin v. Commonwealth, 20 L. R., 1137. In the opinion of which it is said:

"'It appears from the record that the grand jury reduced to writing the testimony of the witnesses before it and furnished to the Commonwealth's attorney the evidence so taken. * * * It was the duty of the foreman of the grand jury, also under the statute, to communicate to the attorney for the Commonwealth when requested, the substance of the testimony before them. But we do not think the Court below should in the exercise of sound discretion have required the Commonwealth's attorney to communicate to the defendant the evidence so reported to him by the foreman of the grand jury.'

"Appellant also complains that the Court refused to compel Green Golden to give certain testimony demanded of him. It appears from the record that Golden was jointly indicted with appellant and others for the murder of William Goebel, and that the prosecution therefor is still pending against them. Golden was introduced by appellant, and after certain preliminary questions, without objection from the Commonwealth, or suggestion from the Court, he announced that he had been indicted in this case, but had not been tried, and claimed his privilege, and he was not required to testify, upon the ground that he could not do so without giving evidence against himself.

"In Roberson's Criminal Law, volume 2, section 980, it said:

"'It is a rule that no person is bound to answer any question, if the answer thereto, would in the

opinion of the trial judge, have a tendency to subject the witness, or the wife or husband of the witness, to any punishment, penalty or forfeiture. And the witness may claim the protection at any stage of the inquiry, whether he has already answered the question in part or not at all. If the fact to which he is interrogated forms but one link in the chain of evidence which is to connect him, he is still protected. The privilege is one personal to the witness and to be exercised by him alone, and counsel will not be allowed to make the objection. Nor can the witness be made to explain how he might be criminated by the answer, as this would strip him of the privilege which the law allows him. But it is not enough for the witness to say that the answer will criminate him. He is not the sole judge of the fact. It is for the Court to determine from all the circumstances whether there is really reasonable ground to apprehend danger to him from his being compelled to answer.' (Burdett v. Commonwealth, 93 Ky., 79; 1st Greenleaf, section 451.)

"Chief Justice Marshall in the trial of Aaron Burr said:

"'If the question be of such description that an answer to it may or may not incriminate a witness, according to the purport of the answer, it must rest with himself, who alone can tell what it would be to answer the question or not.'

(Burr's trial 224.)

"From these authorities, the statements of Golden, and his reasons for not testifying, it was manifest that he is entitled to avail himself of the privilege allowed by law, and the Court properly excused him from testifying. It is insisted for appellant that it was error for the trial court to refuse him permission to recall and further cross-examine H. E. Youtsey. It will be found that the direct examination of Youtsey comprises ten pages of volume three of the bill of evidence, and the first cross-examination one hundred and eighty pages of that volume. On

the first cross-examination he appears to have been on the stand about two days, at the end of which, viz: April 17th, the cross-examination was suspended, and the appellant given until April 20th, to prepare for his further cross-examination. On April 21st, he was again cross-examined at great length, and finally dismissed. On April 23rd, appellant asked to be allowed to recall and still further cross-examine Youtsey, for the purpose of laying the foundation to contradict him by his wife As will be presently shown, the expected contradiction would, if permitted, have been incompetent, but aside from this consideration, after such a long and exhaustive cross-examination as was given the witness, covering, as it would seem, every possible aspect of the case and the witness' relation thereto, we are unwilling to say that it was an abuse of discretion for the Court under the circumstances to refuse to permit him to be recalled for the third time for still further cross-examination.

"We are of the opinion that the Court properly excluded the testimony of Mrs. Youtsey, wife of H. E. Youstey. Section 606, Civil Code of Practice, provides:

"'Neither a husband nor his wife shall testify, even after the cessation of their marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage, &c.' * * *

"In Commonwealth v. Sapp, 90 Ky., 585, it was said by this Court:

"'If the proposed testimony violates married confidence in the slighest degree, or tends however slightly to impair the rule for its protection, the highest considerations forbid its introduction.'

"It will be found that the authorities are uniform in holding that this rule applies, whether such proposed testimony is sought to be introduced in a case

where the husband or wife is party, or only others are concerned.

"In Scott v. Commonwealth, 94 Ky., 511, in an able discussion of this doctrine by Judge Lewis, it was held that a letter to the wife from the husband in relation to a crime with which he was charged, could not be used in evidence by the Commonwealth, and the case was reversed because of its introduction as evidence therein. Applying that rule in this case, the note or letter proposed to be identified by Mrs. Youtsey, as well as any other testimony that she might have given in regard thereto, was clearly incompetent, because the same came to her from her husband by reason of the privacy and confidence of the marital relation, and the use of it to contradict him, would have been as fully within the reason, and as much against the policy of the law, as would any other confidential disclosure that he may have made to her. And the same rule that forbade her testifying in this case, would have excluded as incompetent, any statement from him made to her on the same subject.

"Objection is made that the trial court refused to exclude certain testimony of H. E. Youtsey and Frank Cecil, and also the testimony of Jones and Day. We find that such of the testimony of Youtsey as appears to be incompetent was rejected and stricken out by the Court. We think all the testimony of the four witnesses named, as it is shown by the bill of evidence to have been admitted by the Court, was competent. It related to acts and declarations of the appellant, conducing to establish his guilt, as well as a conspiracy to take the life of William Goebel, in which he was an alleged participant and principal. The testimony in question is of the nature, and similar in character, to much of the evidence held by this Court on the former appeals in this case, and in the several appeals of Caleb Powers, to be competent.

"It is to be borne in mind that the principal wit-

nesses against appellant, and the only ones who claimed to have personal knowledge of his guilt, were his accomplices, whose testimony it was necessary to corroborate as required by section 241, Criminal Code. In the very nature of the case, much of the corroborating testimony was necessarily circumstantial, and where, as in a case like this, such testimony must be relied upon, the evidence should be allowed to take as wide a range as would consist with justice and the well recognized rules obtaining with reference to the admission of such evidence. We are of the opinion, therefore, that while some of the evidence complained of, notably that of Jones and Day, is somewhat remote and even fragmentary, yet in as much as practically the same statements, which they claim to have overheard as coming from appellant, were testified to by the witness Stubblefield as having been made to him by appellant in a conversation about the same time in regard to the death of William Goebel, in which conversation, as stated by Stubblefield, appellant admitted that he had fired the shot which killed Goebel, we think the lower court did not err in permitting the testimony of Jones and Day to go to the jury.

"Appellant also complains of the instructions. But we find that the instructions conform absolutely to the rule laid down by this Court on the second appeal, and are, besides, free from error.

"A careful examination of the record having failed to disclose any error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

"Whole Court sitting.

"Chief Justice Burnam and Judge O'Rear dissent."

DISSENTING OPINION BY JUDGE O'REAR.

"I am unable to agree with the four members of the Court who hold that the presence of the ac-

cused in a felony trial can be dispensed with, even by his consent, during the empannelling of the jury, or at any other stage of the trial. (Bill of Rights Constitution, section 11; Criminal Code, section 183; Meece v. Commonwealth, 78 Ky., 586; Rutherford v. Commonwealth, 78 Ky., 642; Temple v. Commonwealth, 14 Bush, 769; Allen v. Commonwealth, 86 Ky., 642; Hopt v. People of Utah, 110 U. S., 574.)

"Nor can I agree that the evidence by Jones and Day of fragmentary conversations alleged to have occurred in Laurel county, between appellant and some other persons, when it is conceded that the portions detailed are incomplete and disconnected from what went before or followed, is relevant as admissions by the accused. (Berry v. Commonwealth, 10 Bush, 16; Terrell v. Commonwealth, 13 Bush, 246.)

"I concur with the majority of the Court that the rejection of the communication between Youtsey and his wife was prop

(R., 64-73.)

On June 7th, 1904, plaintiff in error filed his motion and petition for rehearing in the Court of Appeals of Kentucky, which are in words and figures as follows:

"MOTION FOR REHEARING.

"Comes the appellant, James B. Howard, and moves the Court to set aside the judgment of affirmance herein and to withdraw its opinion rendered on April 22, 1904, and grant him a rehearing herein, for the following reasons:

"1. He says that said decision is in *conflict* with the *Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State* applicable in said case.

"2. That said decision is in *conflict and derogation of the common law operative in this State.*

"3. He says that same is in violation of his rights *under the Constitution of the United States, and especially under the fourteenth amendment thereof,* because the ruling therein deprives him of his liberty without due process of law, and denies to him the equal protection of the laws.

"4. He says that *same is in violation of his rights as guaranteed him under the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation *of the Constitution of the United States and in derogation of the common law, and more especially the sixth amendment of said Constitution,* because in the examination of said juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

"6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

"'Section 281. What not subject to exception—The decisions of the Court upon challenges to the panel (a) and for cause (b) upon motion to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception.'

"Is in conflict with the rights of the defendant under the Constitution of the United States as well as the Constitution of Kentucky, and the common law obtaining in this State, and *more especially in violation of sections five, six and fourteen of said*

Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in case of felony.

"7. He says that the construction given by the Court in said opinion, of section 281, is erroneous and prejudicial to his rights, in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

"8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence of the defendant, and not to challenges made or heard either in the absence of said defendant or after the juror had been selected and accepted by both the Commonwealth and defendant, but he says that in the event said section is construed by this Court to apply to said State of case, then, that same is in conflict with the Constitution of the United States, and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

"9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, that the Court may have a discretionary power over said juror before he is sworn, but there is a limitation upon said discretion, and that he can not discharge him over the objection of the defendant simply because he has committed a contempt of Court, as the Court has the power to fine him, or otherwise punish him for same, but not to deprive defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark.

"He says that all of said rulings complained of, were and are prejudicial to his rights herein, and he herewith files in support of this motion a petition for a rehearing in this case, and he prays that same may be granted and that said opinion may be set aside or modified, and he asks for all other necessary and proper relief, the premises being considered."
(R., 74.)

PETITION FOR REHEARING.

"Your petitioner, James B. Howard, by his attorney, respectfully asks this Court to set aside or modify the judgment of affirmance herein, and to withdraw its opinion rendered on April 22, 1904, and grant him a rehearing for the reasons as are fully set out in his motion filed, which are as follows:

"1. He says that said opinion is *in conflict with the Constitution of the United States, and also the State of Kentucky, as well as the statutes of said State applicable in said case.*

"2. That said opinion is *in conflict and in derogation of the common law operative in this State.*

"3. He says that same is in violation of his rights *under the Constitution of the United States, and especially under the fourteenth amendment thereof,* because the ruling therein deprives him of his liberty without due process of law and denies to him the equal protection of the laws.

"4. He says that same is in *violation of the rights as guaranteed him under the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation of the *Constitution of the United States and in derogation of*

the common law, and more especially the sixth amendment of said Constitution because in the examination of the juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant.

"6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:

"'Section 281. *What not subject to exception*— The decisions of the Court upon challenges to the panel (a) and for cause (b) upon motions to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception.'

"Is in conflict with the rights of the defendant under the *Constitution of the United States as well as the Constitution of Kentucky and the common law obtaining in this State, and more especially in violation of sections five, six and fourteen of said Constitution of the United States,* because same deprives the defendant of the right of exception upon challenge to the panel, and for cause, upon the selection of a jury in a case of felony.

"7. He says that the construction given by the Court in said opinion, of section 281, is erroneous and prejudicial to his rights, in this: That said section only relates to challenges made to said jury before the acceptance of the jurors, and not to challenges made after said jurors have been accepted by both the Commonwealth and the defendant.

"8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence — the defendant, and not to challenges made or heard, either in the absence of said defendant or after the juror had been selected and

accepted by both the Commonwealth and defendant, but he says that in the event said section is construed by this Court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of the right of trial by jury.

"9. He says that as in this case, after a juror has been accepted by both the Commonwealth and the defendant in a felony case, that the Court may have a discretionary power over said juror before he is sworn, but there is a limitation upon said discretion, and that he can not discharge him over the objection of the defendant, simply because he has committed a contempt of Court, as the Court has the power to fine him or otherwise punish him for same, but not to deprive the defendant of his services upon the jury, and especially is this true where the contempt complained of does not relate to the facts or merits of the case, but merely a jocular remark."
(R., 75.)

Upon the petition for rehearing the Court of Appeals delivered the following response:

"The questions called to our attention in the petition for rehearing under the Constitution of the United States were considered by the Court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant under the fifth, sixth or fourteenth amendment to the Constitution of the United States has been violated.
"The motion for rehearing is overruled."
(R., 78.)

Said petition having been denied, appellant by writ of

error, appealed to this Honorable Court, and assigned for review the following errors:"

(R., 88.)

"Court of Appeals of the State of Kentucky.

"JAMES B. HOWARD, Plaintiff in Error,
"VERSUS
"COMMONWEALTH OF KENTUCKY, Defendant in Error.
} Assignment of Errors.

"Now comes the plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, in the above entitled matter, there is manifest error in this, to-wit:

"1st. The Court erred in holding that James B. Howard on trial herein, charged with a felony, could, together with his attorney, before the jury was sworn, but after one of said jurors had been tested and accepted by both the Commonwealth of Kentucky, and said defendant, Howard, consent to the examination by the Court, separate and apart from defendant Howard and his attorney, of said juror who had been so accepted, against whom a complaint had been made, for the purpose of ascertaining whether or not he was qualified to retain his place as one of the jurors to try the case, and that said examination of said juror so had herein was not in conflict or in violation of the fourteenth (14) amendment of the Constitution of the United States of America or any clause thereof, and did not deprive plaintiff in error, James B. Howard, of his liberty without due process of law, or deprive him of the rights, privileges or immunities secured to him and other citizens of the United States and the State of Kentucky, and did not deny to him the equal protection of the law.

"2nd. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the fourteenth (14) amendment to the Constitution of the United States of America, and that it did not deny to plaintiff in error the equal protection of the law, or abridged his privileges and immunities secured to him by said amendments.

"3rd. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, title, privileges or exemptions exercised under the fourteenth amendment to the Constitution of the United States of America.

"4th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with or in derogation of the common law.

"5th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not a violation of or in conflict with the 'law of the land,' and that it did not abridge the privileges and rights or immunities of said Howard secured to him as a citizen of the United States and State of Kentucky, or deprive him of the equal protection of the law.

"6th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was and is due process of law, and that it did not deprive said James B. Howard of his liberty without due process of law.

"7th. The Court erred in holding herein that its said ruling, as set forth in assignment No. 1 herein, was not repugnant to or in conflict with the statute

of the United States of America, and the authority exercised thereunder.

"8th. The Court erred in holding that the record must affirmatively show that an injury resulted to the substantial rights of said James B. Howard, by the dismissal, by the Court, of J. C. Alexander from the panel of said jury after he had been tested and accepted by both the Commonwealth of Kentucky and said Howard, and in holding that said ruling did not deprive said Howard of the equal protection of the law.

"9th. The Court erred in holding that its said ruling as set forth in assignment No. 8, was due process of law, and that defendant was not thereby deprived of his liberty without due process of law.

"10th. The Court erred in holding that it, the said Court, was expressly forbidden, by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, from reversing said case for an error committed by the trial court, in dismissing said Alexander from said panel of the jury after he had been accepted by both the Commonwealth of Kentucky and the defendant, James B. Howard, and in holding that said ruling did not abridge the privileges and immunities of said Howard as a citizen of the United States.

"11th. The Court erred in holding that its said ruling, as set forth in assignment No. 10 herein, was or is due process of law, and that it did not deprive said Howard of his liberty without due process of law.

"12th. The Court erred in holding that by reason of section 281 of the Criminal Code of Practice of the State of Kentucky, was without power to revise an error committed by the trial court in the manner of the formation or selection of the trial jury, and

in holding that said ruling did not abridge the rights, privileges and immunities of said plaintiff in error.

"13th. The Court erred in holding that its said ruling, as set forth in assignment No. 12 herein, was due process of law, and in holding that it did not deprive said Howard of his liberty without due process of law, and that it did not deprive him of the rights, privileges and immunities secured to other citizens of the United States of America and the State of Kentucky.

"14th. The Court erred in holding that section 281 of the Criminal Code of Practice of the State of Kentucky, or the authority exercised thereunder, is not in conflict with or in violation of the fourteenth (14) amendment of the Constitution of the United States or any clause thereof, and that said section does not abridge the rights, privileges or immunities, secured to plaintiff in error as a citizen of the United States of America and State of Kentucky, and in holding that it does not deny him due process of law and is not in conflict with 'the law of the land.'

"15th. The Court erred in holding that the enactment by the State of Kentucky, of said section 281 of its Criminal Code of Practice, was not the making of a law that was in conflict with or a violation of the fourteenth amendment of the Constitution of the United States of America or any clause thereof, or the common law, and that it did not abridge the privileges or immunity of said Howard secured to him.

"16th. The Court erred in holding that the authority exercised under said section 281 of said Code, and the construction given said section 281 by the courts of said State of Kentucky, and enforced herein, was not in conflict with or a violation of the fourteenth amendment to the Consitution of the

United States of America, or the common law, and that it did not abridge the rights, privileges and immunities of said Howard secured to him.

"17th. The Court erred in holding that its said ruling, as set forth in assignment No. 1 herein, was not in conflict with or repugnant to the right secured to plaintiff in error herein, by the eleventh (11) section of the 'Bill of Rights' in the Constitution of the State of Kentucky, 'to be heard by himself and counsel,' and 'to meet the witnesses face to face.' and was not in conflict with or repugnant to 'the law of the land,' or the common law.

"18th. The Court erred in holding that the enactment by the State of Kentucky of said section 281 of its Criminal Code of Practice, was not in conflict with or derogation of the 'law of the land.'

"19th. The Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the fifth (5) amendment to the Constitution of the United States of America, as depriving plaintiff in error of his liberty without due process of law.

"20th. The Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the sixth amendment to the Constitution of the United States of America, or the clause thereof, giving, in criminal prosecutions, the accused the right to be heard by himself and counsel, and to be confronted with the witnesses against him.

"21st. That the Court erred in holding that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the fifth

(5) amendment to the Constitution of the United States of America.

"22nd. The Court erred in holding herein that its said ruling, set forth in assignment No. 1 herein, was not a violation of or in conflict with the rights, titles, privileges or exemptions exercised under the sixth amendment to the Constitution of the United States of America."

I.

QUESTION.

The principal question before this Honorable Court is whether the Federal Constitution has been violated in the trial of the plaintiff in error, or by the decision of the highest State court having jurisdiction of the questions assigned as errors.

In other words, did the State of Kentucky in the trial of the plaintiff in error, go beyond her powers? Was he, by her laws, or as they were administered during his trial, deprived of his liberty without due process of law, or was he denied the equal protection of her laws, prohibited by the 14th amendment to the Federal Constitution?

This contention of plaintiff in error is based upon the claim that he was prejudiced in his substantial rights on his trial—

1. In the discharge of J. C. Alexander from the jury, over his objection.

2. In the construction given section 281 of the Criminal Code of Practice of Kentucky, by the Appellate Court.

It is the contention of the Commonwealth that neither proposition is sound.

II.

CITIZENSHIP.

There is a dual citizenship under the Constitution and laws of the United States, and the Constitution and laws of the State.

The privileges and immunities of a citizen of the

United States are quite different, and in many particulars very distinct, from the privileges and immunities of citizens of the several States.

In the prosecution of an accused in any United States District or Territorial Court, for a violation of the criminal and penal laws of the United States, the accused may invoke the sovereign power of the Federal Government, through its judicial agency, that he be not deprived of a privilege, or an immunity under its Constitution and laws, without due process of law; and that he have the equal protection of the law.

These are the privileges and immunities which are guaranteed the Federal citizen under the 5th and 6th amendments to the Federal Constitution; but neither has any application to the privileges and immunities of an accused in a State court for a violation of the criminal and penal laws of such State. *Here he must invoke his constitutional and statutory rights of the State;* and the 14th amendment of the Constitution of the United States prohibits such State from depriving him of his liberty without due process of law, or denying him the equal protection of her laws.

III.

THE 5TH AND 6TH AMENDMENTS OF THE FEDERAL CONSTITUTION DO NOT APPLY.

The plaintiff in error was on trial in a State court, on a criminal charge for a violation of its laws.

The fourth and fifth reasons assigned in his motion and petition for a rehearing, and now urged here, read:

"4. He says that same is in violation of the rights as guaranteed him under *the fifth amendment of the Constitution of the United States,* because it deprives him of his liberty without due process of law.

"5. He says that same is in violation of the Constitution of the United States and in derogation of the common law, *and more especially the sixth amendment of said Constitution,* because in the examination of said juror, J. C. Alexander, same was had by the Court on said challenge in the absence of the defendant and counsel, and said Alexander discharged by the Court over the objections of the defendant after he had been accepted by both the Commonwealth and the defendant."

This Honorable Court has so often decided that these amendments to the Federal Constitution do not apply to a criminal prosecution in a State court for the infraction of its criminal laws, we scarcely deem it necessary to consider these assigned errors; and after having cited the following cases, we shall dismiss these errors from further consideration:

U. S. v. Cruikshank, 92 U. S., 542 (23-590).

Ex parte Spies, 123 U. S., 131 (31-86).

Brown v. New Jersey, 175 U. S., 175 (44-120).

Maxwell v. Dow, 176 U. S., 593 (44-602).

West v. Louisana, 194 U. S., 261 (48-969-70).

In the case of U. S. v. Cruikshank, 92 U. S., 542 (23-590), the Court said:

"The people of the United States, resident within any State, are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established

for different purposes and have separate jurisdictions."

In Ex parte Spies, 123 U. S., 131 (31-86), it was said:

> "The first ten articles of the amendments were not intended to limit the powers of the State Government in respect to their own people, but to operate on the National Government alone, was decided more than a half a century ago, and that decision has been steadily adhered to since. * * * Interpreted in this way, the statute is not materially different from that of the territory of Utah, which we had under consideration in Hopt v. Utah, and to which we then gave effect. As that was a territorial statute, passed by a territorial legislature, for the government of a territory over which the United States had exclusive jurisdiction, it came directly within the operation of article 6 of the amendments, which guaranteed to Hopt a trial by an impartial jury. No one at that time suggested a doubt of the constitutionality of the statute, and it was regarded both in the territorial courts and here as furnishing the proper rule to be observed by the territorial court in empanneling an impartial jury in a criminal case."

In the case of Brown v. New Jersey, 175 U. S., 175 (44-120), the Court said:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on the Federal Government. * * * The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. * * * The 14th amendment does not profess to secure to all persons in the United States the benefit

> of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its mode of judicial proceedings."
>
> (Mo. v. Lewis, 101 U. S., 22.)

In the case of Maxwell v. Dow, 176 U. S., 593 (44-602), Maxwell was indicted by a grand jury of the territorial government of Utah, but before his trial, Utah had become a State, and adopted a Constitution of its own, and therein made eight, instead of twelve, the number which constituted a legal jury. He was thereafter tried by a jury composed of eight jurors, and this Honorable Court, on a writ of error, reversed the judgment of conviction, because eight jurors did not make a legal jury under the 6th amendment to the Federal Constitution, which was applicable to his case at the time the offense was committed, and in drawing a distinction between the privileges and immunities under a State Government and the privileges and immunities under the Federal Government, this Court said:

> "The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the National Government, and are granted or secured by the Constitution of the United States."

In West v. Louisiana, 194 U. S., 261 (48-969-70), the Court was considering the constitutional right as claimed by plaintiff in error, under the 6th amendment to the Constitution of the United States, to meet the witness

face to face, who testified against him, on the trial of a State offense in a State court, and the Court said:

> "The 6th amendment does not apply to proceedings in State courts. The question as to what is required under its provisions, in order to preserve the right to be confronted with the witness, is eliminated from any inquiry by this Court in this case."

IV.

DISCRETION OF TRIAL COURT.

The challenge of J. C. Alexander was known at common law as a challenge to the favor. When a juror was challenged for favor, his indifference was determined by triers. These triers were appointed by the Court. They tried the first juror and if found competent or indifferent, he was sworn and he and said triers in like manner selected the second juror, who was thereupon sworn, and these two jurors were then constituted the triers to pass on the competency of the remainder of the jury.

There could be no exception to, or review of, the decisions of said triers in the selection of the jury.

Cooley's Blackstone, book, 3 chapter 23, section 3.

By section 212, Criminal Code of Kentucky, the trial court is substituted for the triers of such challenges at common law; and, as at common law, its decisions are not subject to exception or review, under section 281 of the said Criminal Code.

The Court tries the challenges in a summary manner, and in such manner as will enable it to say whether each juror is indifferent as between the accused and the State.

It is the Court, and not the juryman or the accused, who shall say whether or not the proposed juror is free from bias and prejudice.

Section 212, *supra*, has therefore abridged the trial of challenges, by dispensing with the triers at common law and substituted in lieu thereof the judge of the trial court, and the common law practice of determining whether or not the juror was indifferent has been replaced by the methods laid down in our statutes and the Code.

As said in Thompson and Merriam on Juries, section 259:

> "It follows from the general statement of the powers of the Court over the process of impanneling, as found in the previous section, *that the exercise of this power is a matter of discretion.* The circumstances under which this power is ordinarily exercised will be presently noticed. Nevertheless, it by no means follows that, because certain causes have been declared to be sufficient to justify the trial court in excusing a juror, the sufficiency of excuses in general must be considered as a matter of law. *On the contrary, it may be regarded as a generally recognized rule that the discharge of a juror under these circumstances is a matter addressed to the sound discretion of the Court, which will not be reviewed, in the absence of evidence showing prejudice to the complaining party from the abuse of such discretion.*
>
> "As incidental to the power of directing jurors who are unchallenged to withdraw, because in the judgment of the Court they are not qualified to discharge the duties required from jurors, *the Court has authority, either by an examination of the juryman or of any other witnesses to ascertain matters of fact, so as to enable it to exercise this power discreetly.*"
>
> 95 N. C., 611, State v. Green.
>
> 43 Maine, 1-143, State v. Knight.

As said in the case of Snow v. Weeks, 75 Maine, 106:

> *"It was a matter for the exercise of the discretion of the judge. To his ruling upon such a question exceptions do not lie. He may put off a juror when there is no real and substantial cause for it. That can not legally injure an objecting party as long as an unexceptionable jury is finally obtained.* IT IS QUITE A DIFFERENT QUESTION WHERE A JUDGE PUTS A JUROR UPON THE PANEL WHO CAN NOT SIT."

The essentials under the Constitution and laws of Kentucky, like at common law, are that the jury in a felony case shall be composed of twelve men; that they shall be impartial, and that their verdict shall be free and unanimous.

These are the *substantive rights* secured by a trial by jury. The procedure and mode of selecting the jury is not such a right, *unless the right to challenge is equivalent to a right to select.*

Cooley's Constitutional Limitations, 8th Ed., 445-460.

In Hayden v. Commonwealth, 20 R., 274, the trial court discharged two jurors, after they had been sworn on their *voir dire* and in the absence of the accused from the *court room,* and the same question as presented here was involved, and the Court held there was no error, and said:

> *"It appears that after the jurors had been sworn to answer questions, two of them thus sworn were excused by the Court in the absence of the defendant from the court room. This was done without objection of counsel for the appellant, and it does not appear for what cause they were excused. So far as this record shows it may have been done at the instance of the counsel for appellant.*
>
> *"The complaint on this appeal is that the Court*

proceeded to the extent we have indicated without the presence of the defendant. It is true that the defendant should be, and is, entitled to be present at the trial of his case. The presumption must be indulged that the jurors were excused by the Court for cause. *Although the Court might have erred in excusing them, this Court could not reverse on that account. Under these circumstances it necessarily follows that the defendant's momentary absence could not have been prejudicial to his right in a legal sense,* because this Court could not review the action of the Court in excusing the jurors. Besides, the record shows that the appellant's substantial rights were not prejudiced by the action of the Court. The evidence in this case authorized the jury to find defendant guilty of murder."

V.

JURY TRIAL.

A trial by jury according to its meaning in Magna Charta, and at common law, with all its essential incidents, has been had when the accused has been tried by twelve fair, impartial jurymen of the vicinage, whose verdict is free and unanimous, although their selection and the mode of challenge has been different from that at common law.

The challenge made to juror J. C. Alexander, the order, the affidavit of Hackett, and the ruling of the trial court and bill of exceptions on said challenge, ruling and order referred to in the petition for rehearing, disclose no fact which shows that plaintiff in error was not tried by a fair and impartial jury, and this satisfied his constitutional right, Federal and State.

And the record need not show that these privileges or rights were formally tendered to him and formally declined, or that an express waiver was signed. It is enough if it does not appear that they were denied when he applied for them. So there are many other matters which his failure to object to at the time prevents his afterwards complaining of."

VII.

J. C. ALEXANDER, THE JUROR.

The discharge of J. C. Alexander on the challenge of the Commonwealth by the trial court is the ground upon which the plaintiff in error has assigned two errors committed by the trial court, to-wit:

First, because it was error for the trial court, *in the absence of the plaintiff in error, but with his consent*, to ask the juror, Alexander, if he made the statement to said Hackett, to-wit: "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

Second, because it was error for the trial court to discharge said Alexander, on the challenge of the Commonwealth, *for good cause*, after he had been tested and accepted by both parties, but before the jury was sworn.

Order, R., 32.

Affidavit of Hackett, R., 32.

Bill of exceptions, R., 33-34.

VIII.

FIRST ERROR.

It will be seen from this record that plaintiff in error was present when Alexander was challenged; that he was present when the affidavit of Hackett was filed; that he was present when said motion was made, and he objected to said motion; that said motion and objection were heard and argued before the Court, in his presence; that the trial court ruled on said motion and challenge and discharged said Alexander in his presence; that he excepted thereto, and that he then made a motion to discharge the panel, which was overruled, and he excepted.

The record does not disclose what took place on this privy examination of Alexander, but inasmuch as it does show that Alexander admitted that he had made the statement, it may be fairly presumed that the Court did ask him the question.

The only reference made to the discharge of the juror, Alexander, by the plaintiff in error, is the second assigned error in his motion and reasons for a new trial (R., 47) and reads:

> "2nd. Because the Court erred in discharging and excusing J. C. Alexander for service herein as a juror, after he had been accepted, and also in overruling the motion then made by defendant herein, to discharge the entire panel, so far as then accepted, to all of which defendant at the time excepted."

It will thus appear from the record that if the trial court asked said Alexander said question in the absence of the plaintiff in error, it was by and with his consent, and without objection or exception then made or taken;

and it further appears that it was not assigned as error in his motion and reasons for a new trial, nor was the attention of the trial court called to it in any manner, nor did said trial court act on same.

The Kentucky Court of Appeals has only appellate jurisdiction to review any error of law which appears on the record, when upon consideration of the whole case the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

Constitution, section 110, Appendix, 6.

Criminal Code, section 340, Appendix, 14.

It follows that, no objection or exception having been made or taken in the trial court as to alleged error of the trial court in asking said question in the absence of plaintiff in error, and no error having been assigned by plaintiff in error in his motion and reasons for a new trial for the same, there was no error appearing on the record for review by the Court of Appeals.

Rutherford v. Commonwealth, 78 Ky., 639.

Kennedy v. Commonwealth, 14 Bush, 340.

Wilkerson v. Commonwealth, 88 Ky., 30.

Merritt v. Commonwealth, 11 R., 17.

Brown v. Commonwealth, 14 Bush, 400.

Ellis v. Commonwealth, 9 R., 824.

Crockett v. Commonwealth, 10 R., 159.

Redmon v. Commonwealth, 82 Ky., 335.

Vinegar v. Commonwealth, 104 Ky., 110.

Branson v. Commonwealth, 92 Ky., 333.

In Rutherford v. Commonwealth, 78 Ky., 639, it was claimed that the Court erred in directing the jury to view

the place of the killing in the absence of the accused, and on this the Court said:

> "It must, however, be borne in mind that in this Court the accused has no constitutional rights. Our power to review the rulings of the lower court in such cases is derived from the statute, and must be exercised within the statute. Whatever our views may be in any particular case, as to whether the accused has had such a trial as is guaranteed to him by the Constitution, *we can not revise the rulings of the trial court unless the authority is conferred by statute.* For constitutional rights the appeal is to the trial court, and not to this Court. The inquiry, then, is, is this such an error as will, under the statute, authorize a reversal?"
>
> 'In felony cases, section 340 of the Criminal Code, which went into effect January 1st, 1877, provides:
>
> "A judgment of conviction shall be reversed for any error of law to the defendant's prejudice, appearing on the record.
>
> "By an act approved March 4th 1880, that section was amended so as to read:
>
> "'A judgment of conviction shall be reversed for any error of law appearing upon the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.'
>
> "If this amendment is ordinarily to have any effect, it must be construed to mean that the power of this Court to reverse in felony cases depends upon two things: *First, that an error appears in the record; second, the Court must be satisfied from consideration of the whole case that the substantial rights of the accused have been prejudiced by the error complained of.*"

In Kennedy v. Commonwealth, 14 Bush, 340, where the complaint was to the summoning of the jury by other

persons than the regular sheriff, and *where appellant failed to object before the rendition of the verdict,* the Court in passing on this question said:

> "*No objection was made before the verdict, on account of the manner in which,* or the persons by whom the jurors were summoned. There is, *we think, enough in the record to show that the person named as special sheriff and his assistants were designated by the Court to summon the jury, and as appellant and his counsel must have known by whom the jury was summoned, and by what authority the parties summoning the jury acted, and failed, until after verdict, to make any objection to the jury on that ground, any irregularity in that respect was waived.* * * * As the appellant *had no right to except* to the order overruling his motion for a new trial, he had no right to have a bill of exceptions, exhibiting anything brought into the record for the first time on that motion, and *as he had no right to have such a bill of exceptions, it constitutes no part of the record, and can not be considered by this Court;* and consequently we can not know that any such error as that complained of was committed.
>
> "*We have no power to look into a bill of exceptions which the legislature has declared should not be allowed, or into a general bill for matters not subject to exception, and then to reverse for an alleged error thus improperly appearing in the transcript.*
>
> "We must reverse for any error of law appearing in the record to the prejudice of the appellant, *but this only applies to such errors as the party had the right to manifest by a bill of exceptions;* and as a bill of exceptions not only not authorized, but expressly prohibited by law, *is no part of the record, an error in respect to any of the matters which under section* 281, *can not be excepted to, is not an error appearing 'in the record' within the meaning of section* 340."

In the case of Wilkerson v. Commonwealth, 88 Ky., 30, wherein appellant was convicted of murder, and on appeal among other errors assigned was:

> "Third. In permitting four of the jurors, after they had been selected as such, but before they were sworn, and during an adjournment of the Court for dinner, to go at large and mingle with the crowd, instead of putting them in charge of an officer."

In passing on this alleged error, the Court said:

> "*No objection was made or exception taken at the time to the action of the Court as to the four jurymen.* The question was first presented on the motion for a new trial. We can not, therefore, consider it."

In the case of Merritt v. Commonwealth, 11 R., 17, no exceptions were taken to any action of the trial court, save in overruling the motion for a new trial, and the Court said:

> "*If a party during the trial of a criminal cause does not take an exception to the ruling of the Court when made, and for the first time presents an objection on account of it in his motion for a new trial, it comes too late to enable him to present the question here for revision.*"

In Brown v. Commonwealth, 14 Bush, 398 (400), it is said:

> "*Objection first made in motion and grounds for new trial as to alleged errors committed during the progress of the trial can not be considered by the Court of Appeals.* * * * Much of the argument of counsel for appellant was directed to the alleged errors of the Court below, in permitting the jury to view the place of killing, without the presence of

> the prisoner and without having the place pointed out to the jury by the Court, or by anyone designated by the Court; *and in permitting the jury to separate during the trial, to receive evidence out of Court and in the absence of appellant. These points as well as several others relied upon in the argument can not be considered by this Court because no objection was made to the action of the Court until the motion for a new trial was made.*"

In the case of Ellis v. Commonwealth, 9 R., 824, it was held:

> "There can be no reversal in a criminal case for an error of the Court in overruling a motion for a new trial, *or because of a matter called to the attention of the Court for the first time by the grounds for a new trial.* Before this case was finally submitted to the jury some one said to one of the jurors, 'Send him up for five years,' and the fact was first called to the attention of the Court by the grounds for a new trial; if this illegal interference with the trial of the case had been called to the attention of the Court at the time, and a motion made to discharge the jury, it would have been a reversible error to overrule it, but the Court can not reverse for the error in overruling the motion for a new trial."

In Crockett v. Commonwealth, 10 R., 159, the Court said:

> "The principal ground relied on for reversal of the judgment of manslaughter in this case is that the jury having up to that time been unable to agree, was influenced to find a verdict of guilty by a statement of the jailer in the presence of one of the jurymen, that the accused preferred a conviction and punishment for a short time in the penitentiary to have the jury disagree. The alleged undue influence upon the jury could have been considered by the lower court only upon motion for a new trial, and as sec-

tion 281, Criminal Code, expressly provides that decisions upon such a motion shall not be subject to exception, this Court is precluded considering it upon this appeal. *Moreover the misconduct of the jury is not, in the meaning of section 340, an error of law for which this Court can reverse a judgment of conviction, but seems, like kindred subjects, to have been intentionally left to the sole judgment of the trial court.*"

In the case of Redmon v. Commonwealth, 82 Ky., 335, one of the grounds relied upon was, that the verdict was reached by lot, and this alleged error was for the first time presented to the Court on a motion for a new trial, and the Court held:

"*From these provisions of the Code the jurisdiction of this Court to try and determine felony cases is derived. The Constitution confers no jurisdiction upon this Court in such cases, but authorizes the Legislature to grant such jurisdiction as it may think proper. We have no more right to depart from or to enlarge the limits of the jurisdiction, as prescribed by the statute, than we would have to assume jurisdiction in case the Legislature had seen fit not to confer any appellate jurisdiction.* The Code, as quoted (section 281) provides that we may consider and reverse in criminal cases where the error appears in the record by bill of exceptions, presented in the manner prescribed, and also provides that the error here complained of (overruling motion for new trial) shall not be subject to exception. We can no more consider an alleged error so presented than we could a case in which there was no bill of exceptions, for in fact a bill of exceptions not authorized is no bill. *We have nothing to do with the policy or impolicy of conferring jurisdiction, in criminal cases, upon this Court, whether limited or unlimited. That belongs to the legislative department. Errors such*

VI.

NO ERROR IN THE DISCHARGE OF ALEXANDER THE JUROR. IT WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT.

Assuming that the trial court did examine Alexander separate and apart from plaintiff in error, it was by his consent and agreement; it was before the trial, under section 183 of the Criminal Code, began, and his presence was not necessary to give the Court jurisdiction to ask said Alexander said question; it was not made a ground by plaintiff in his motion for a new trial, and it not having been made a ground in said motion, and not having been passed upon by the trial court, there was no ruling of the trial court to be reviewed by the Appellate Court, and the Appellate Court being without original jurisdiction to consider said question, this question has never been presented in the highest State court having jurisdiction thereof, and passed on adversely to the plaintiff in error.

Criminal Code, section 202, reads:

> "Section 202. It (challenge) must be taken before he is sworn in chief, unless the Court for good cause permit it to be made at any time before the jury is completed."

Proffat on Jury Trials, section 194, reads:

> "The time when a challenge should be taken to a juror for cause, is when the juror is presented to a party, and before he is sworn. * * * *Nevertheless, a challenge may be allowed in the discretion of the Court, to a juror, after a juror has been sworn and accepted. It is evident that a Court must be invested with the discretion to further the interests*

of justice; for there may often be cases where some serious objection to a juror could not be known until after he was impannelled, or there may be some objection arising from the conduct of the juror subsequent to his being accepted, that should exclude him on the motion of either party. Accordingly, we find such discretion exercised by the Court, without objection. Thus it has been held that, though neither party has a right of challenge after a juror is sworn, it is in the discretion of the Court to protect the administration of justice, by investigating, at any stage of the trial, an objection to the impartiality of a juror, by withdrawing the case from the jury, if any juror is found unfit to sit thereon."

It is shown by the affidavit of Hackett, filed in support of the challenge to said Alexander, that he (Alexander) had had many conversations and arguments with said Hackett about the killing of said Goebel; that much earnest interest and feeling was expressed in these arguments by both Alexander and Hackett, and that said Alexander expressed and urged that there had been no conspiracy among those charged (plaintiff in error being one of them) with the murder of said Goebel. It is also shown by said affidavit, that just after said Alexander had been sworn and examined on his *voir dire,* and admonished by the Court under oath not to converse with any one, or with the other jurors, who had been examined, about the case, and had been placed in charge of the sheriff, he (Alexander) as he went away from the court house, said to Hackett: "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you."

It is not denied that said Alexander had had said conversations and arguments with affiant, Hackett, or that

the charges against him are untrue; and the record shows that said Alexander admitted that he, in violation of his oath and the admonition of the Court, made the statement to said Hackett. It is not claimed by able counsel for plaintiff in error that Alexander was indifferent between the State and plaintiff in error; or that he was a fair and impartial juror. The Court will note from the record that the challenge was made and argued in the presence of the plaintiff in error, and he was discharged in his presence, but if the Court asked Alexander said question, it was after the challenge had been made and argued. If the Court desired to test the truth of the statement made in the affidavit, he had the right and discretion to do so by interrogating Alexander, and if he had any doubt, it was his duty to protect the administration of justice by so doing.

At the time Alexander was discharged the Commonwealth had exhausted three of its five peremptory challenges, and the plaintiff in error had used twelve of his fifteen. It is not contended by the plaintiff in error that the juror who was called and served instead of Alexander was biased or prejudiced against him, or that he was not indifferent as between the Commonwealth and the plaintiff in error; but he asserts that he had a vested right in the retention of Alexander upon the jury, and by his dismissal he was deprived of a constitutional right. This contention is unsound, as shown elsewhere in this brief.

In State v. Adams, 20 Kan., 689, the Court quoting section 10 of the Bill of Rights and section 207 of the Criminal Code of said State, which are as follows:

> "In all prosecutions the accused shall be allowed to appear and defend in person, or by counsel, to

demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process to compel the attendance of wintesses in his behalf," &c.

And section 207 of the Criminal Code, as follows:

"No person indicted or informed against for a felony can be tried unless he be personally present during the trial," &c.

The Court said by Justice Brewer:

"So far as the provision in the Bill of Rights is concerned, there are two questions: 1st. Is it anything more than the grant of certain privileges, which an accused may waive? and where the record shows no application for the benefit of such privileges, and no refusal of the Court to grant them, and no objection to any action of the Court thereon, is there any error? And, 2nd. Does the sending of a jury to view the place of the alleged crime, in the absence of the accused, trespass on any of its guaranties? *First.* The language is permissive 'The accused shall be allowed;' that is, he may have if he wishes. If he does not wish, he may forego. If he does not wish them, he can not complain that they were not forced upon him. Generally that which is a mere personal privilege, which is not essential to jurisdiction, which is not absolutely and peremptorily required by statute or public policy, may be waived. In the case of State v. Polson, 29 Iowa, 133, the defendant consented that a copy of the testimony given in a former trial might be read as evidence instead of an oral examination of witnesses, and he was held concluded by such consent. His right to meet the witnesses face to face he had waived. So while he is entitled to have counsel, he is not compelled to have them. He has a right to a subpoena for his witnesses, but he is not obliged to have one issued.

Dreyer v. Illinois, 187 U. S., 83.
Jacobi v. Alabama, 187 U. S., 107.
Layhin v. Missouri, 187 U. S., 214.
Tarrance v. Florida, 188 U. S., 573.

In the case of Dreyer v. Illinois, 187 U. S., 79 (47-83), the plaintiff in error had been convicted in the criminal court of Cook county, Illinois, upon a charge of embezzlement, and his punishment fixed at confinement in the State Penitentiary.

In the submission of the case to the jury the Court failed to comply with a law of that State, requiring a constable or other officer to be sworn to attend and keep the jury together while considering the verdict, in conformity with the following provision of the Criminal Code of Illinois:

> "When the jury retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of Court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into Court." * * *

The supreme court of that State had held in a number of cases in construing the section of the Code above quoted, that such failure on the part of the Court to swear the constable or other officer, when the case was submitted to the jury, was reversible error.

In that case, the bailiffs in charge of the jury, filed their affidavits setting up the fact that the required oath

had been administered to them upon the beginning of the trial, but the case was not given to the jury till six days thereafter, and that said oath was held not sufficient, but the plaintiff in error in that case, *as in the case at bar, failed to make any objection or save any exception to the officers taking charge of the jury,* without first taking the oath.

His conviction having been affirmed by the supreme court of Illinois, he upon writ of error prosecuted an appeal to this Court.

Justice Harlan in delivering the opinion of the Court, said:

> "It was, however, held that under the principles established by former decisions in Illinois, the requirements of the statute could be waived by the accused, and *that his failure to object at the time, that the officer having charge of the jury was not sworn* when the jury retired, *was equivalent to a waiver of compliance with its provisions.* And it was adjudged 'that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record (of this case), and therefore (is) not available as error in this Court.'
>
> "It thus appears that while the State court expressly recognized the rights of the accused under the statute, *it adjudged that he had not properly raised on the record the question, raised for the first time on motion for new trial, as to noncompliance with its provisions.* But, manifestly, this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the *record does not show that he objected at the time to the action of the Court, was an adjudication simply of a question of criminal practice and local law, was not*

in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law. We can not perceive that such a decision by the highest court of the State brings the case upon this point within the 14th amendment, even if it should be assumed that the due process of law prescribed by that amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they returned their verdict or were discharged.

"*We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the State court, even if it erred in its decision, did not infringe any right secured to the defendant by the Constitution of the United States.*"

XI.

WHEN THE CHALLENGE TO A JUROR HAS BEEN ALLOWED AND AN IMPARTIAL JUROR SUBSTITUTED IN HIS PLACE, THE CONSTITUTIONAL RIGHT OF THE ACCUSED TO A FAIR AND IMPARTIAL JURY HAS NOT BEEN IMPAIRED.

At the time Alexander was discharged the Commonwealth had exhausted three of its five peremptory challenges, and the plaintiff in error had used twelve of his fifteen. It is not contended by the plaintiff in error that the juror who was called and served instead of Alexander was biased or prejudiced against him or that he was not indifferent as between the Commonwealth and the plaintiff in error; but he asserts that he had a vested right in the retention of Alexander upon the jury, and by his

dismissal he was deprived of a constitutional right. This contention is unsound, as will be seen from the following authorities:

Thompson & Merriam on Juries, page 268, section 251.
Reynolds v. U. S., 98 U. S., 247.
U. S. v. Morris, 26 Fed. Cases, No. 15,815.
Hopt v. Utah, 120 U. S., 430 (30-708).
Hays v. Missouri, 120 U. S., 71 (30-580).
Ex parte Spies, 123 U. S., 131 (31-81).

Thompson & Merriam on Juries, section 251, reads:

> "Where a statute simply provides that an exception may be taken to the decision of the trial court in *disallowing* a challenge, no exception lies to the action of the Court in *allowing* a challenge. The reason is that when a *competent jury, composed of the requisite number of persons, has been impannelled and sworn in the case, the purpose of the law has been accomplished. Neither party can be said to have a vested interest in any juror; therefore, although in impannelling a jury one competent person has been rejected, yet if another equally competent has been substituted in his stead, no injury has been done.*
>
> "By the Criminal Code of Kentucky all challenges are tried by the Court, and its decision in no case is subject to exception."

In Reynolds v. United States, 98 U. S., 168 (25-247), the Court in passing on a similar question said:

> "It needs no argument to show that such a jury could not have gone into the box entirely free from bias and prejudice, and that if the challenge was not good for principal cause, it was for favor. A judgment will not be reversed simply because a challenge,

good for favor, was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not here upon what form of challenge they were set aside."

In U. S. v. Morris, 26 Fed. Cases, No. 15,815, the Court said:

> "Suppose a prisoner on trial for his life should inform the Court that a juror had been bribed to convict him—that the fact was unknown to him when the juror was sworn and that he had just obtained plenary evidence of it, which he was ready to lay before the Court—is the Court compelled to go on with the trial? Suppose the judge, during the trial, obtains by accident personal knowledge that one of the jurors is determined to acquit or convict without any regard to the law or the evidence, is he bound to hold his peace? In my judgment such a decision would be as wide of the common law as it would be of common sense and common honesty."

In the case above each juror had answered on his *voir dire* that he had no opinion or bias. After the jury was sworn and the witnesses examined for the prosecution, the attorney for the Government challenged one of the jurors for bias; the defendant objected, but, after hearing the proof, the Court sustained the challenge and discharged the jury, and it was held to be no bar.

Dilworth v. Commonwealth, 12 Gratt., 689.

In Hopt v. Utah, 120 U. S., 430 (30-708), the Court said:

> "When a challenge by a defendant in a criminal action to a juror for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant and excused, and an impartial and competent juror is obtained in his place,

no injury is done the defendant, if until the jury is completed he has other peremptory challenges which he can use."

In Hayes v. Missouri, 120 U. S., 71 (30-580), the Court in substance said:

> *"The right to challenge is the right to reject, not to select a juror. If from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained."*

In Ex parte Spies, 123 U. S., 131 (31-85), this Court said:

> "On an application to this Court for a writ of error to a State court, *on the ground that a statute of a State as construed by the State court, deprived the petitioner of a trial by an impartial jury, this Court will only consider rulings on the challenges to the jurors who actually sat at the trial. When a challenge to a juror for bias is disallowed and the juror is peremptorily challenged and excused, and an impartial juror is obtained in his place, the constitutional right of the accused is maintained."*

XII.

HOPT v. UTAH.

This case (Hopt v. Utah, 110 U. S., 263) is relied on by plaintiff in error, and we desire to draw the distinctions between it and the case at bar.

1.

The Hopt case was under an indictment in the United States Court for the Territory of Utah. Hopt challenged six jurors for cause.

In the case here, the Commonwealth of Kentucky challenged Alexander for cause.

2.

The district attorney objected to the challenge in the Hopt case.

The plaintiff in error objected to the challenge in the case at bar.

3.

Under the Code of Utah triers were appointed in the Hopt case to try and determine the challenges under instruction of the Court.

In the case at bar, under the Code of Kentucky, the Court hears and determines the challenges in a summary manner.

4.

In the Hopt case the triers took the jurors challenged from the court room; *out of the presence of both the Court and the defendant and his counsel*, and there tried the grounds of challenge, and overruled said grounds. There was no agreement as to this procedure, nor was there an objection or exception.

In the case at bar the Court heard the challenge of the Commonwealth and the argument of counsel on same, in the presence of the plaintiff in error; but before discharging Alexander, *by agreement between counsel*, the trial court asked Alexander as to the truth of the statement in the affidavit. The challenge was sustained, and Alexander was discharged over objection of plaintiff in error.

5.

In the Hopt case, after exhausting his peremptory chal-

lenges, defendant was compelled to accept one of the six jurors he had challenged.

In the case at bar Alexander was discharged, without the Commonwealth being required to peremptorily challenge him.

6.

In the Hopt case, which was tried in the United States Court, in the Territory of Utah, it was held that the trial began with the selection and work of empanneling the jury, and that the presence of the accused could not be dispensed with.

In the case at bar, as we show by citations of opinions of the Kentucky Court of Appeals, construing sections 11 of the State Constitution and 183 of the Criminal Code, the rule is well settled that the trial begins when a jury has been selected, sworn and charged with the deliverance of the accused, and even occasional absence thereafter is no grounds for reversal, unless it appears from the whole record, that the substantial rights of the accused were prejudiced thereby, and the construction of section 11 of the State Constitution and section 183 of the Criminal Code, by the Kentucky Court of Appeals, as to the right of the accused to be present and meet the witnesses face to face, only refers to his rights after the accused has been arraigned, entered his plea, and the jury is sworn and charged with his deliverance.

7.

The Hopt case having been brought to this Court on a writ of error to the United States territorial court, the jurisdiction of this Honorable Court extended to any

as that complained of here were left to the discretion of the lower or trial court, where the whole jurisdiction might have been left, if the Legislature should have thought proper."

In the case of Vinegar v. Commonwealth, 104 Ky., 114, the Court, after quoting fully what we have quoted above from the Redmon case, and other cases cited above, used the following language:

"After careful consideration by the entire Court, we think that the argument of this opinion, which has been followed in numerous cases, construing section 281, *Criminal Code, is unanswerable."*

In the case of Branson v Commonwealth, 92 Ky., 333, in passing on the question of proper time for objecting and excepting, the Court said:

"Where the step is proposed to be taken by the other party it should be objected to, in order to specially call the Court's attention to it; and if its ruling be adverse to the objecting party, then he must except. This is the proper practice. It is the express rule of the present Civil Code, and a proper conduct of criminal cases requires, in our opinion, the same practice. The provisions of the Criminal Code admit, and it seems to us require, such a construction. The trial judge should be made aware when one side proposes to take a certain step in a case that it is objected to upon the other side. This is fair to him. The matter is likely then to receive more careful attention from him. *The party ought not to wait, as if he were consenting, and then afterward merely except to what has been done. He should also except to the decision when made, else it can fairly be inferred that, although he objected when the step was proposed by the adverse party,*

yet that he has acquiesced in the Court's decision as correct."

IX.

Hence the conviction of the plaintiff in error was due process of law; and this question having been neither presented to the trial court, nor passed on adversely to him by it, it was not before the Kentucky Court of Appeals for review, and it being without jurisdiction to consider said question, there is no ruling of the trial court or the Kentucky Court of Appeals, as appears from the record, which presents to this Court any question of a Federal nature.

Dreyer v. Illinois, 187 U. S., 83.
Jacobi v. Alabama, 187 U. S., 107.
Brooks v. Missouri, 124 U. S., 456.
Baldwin v. Kansas, 129 U. S., 641.

In Jacobi v. Alabama, 187 U. S., 107 (47-107), wherein was raised the question of the constitutional right to meet the witnesses against him face to face; and in considering same, made a distinction between a writ of error from the highest court of a State, and from the supreme court of a Territory. The Court held:

> "A writ of error to review the judgment of the highest tribunal of a State stands on a far different ground from a direct appeal from the supreme court of a Territory, and can not be maintained in the absence of a Federal question giving jurisdiction. * * * In Spies v. Illinois, 123 U. S., 131, * * * Mr. Chief Justice Waite said: 'To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by a state Court of any title, right, privilege or immunity claimed under the Con-

stitution, or any treaty or statute of the United States, *it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time in the proper way. To be reviewable here, the decision must be against the right to so set up or claimed. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more.*

"This is not, as it seems to be supposed by one of the counsel for petitioners, *a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right to review here is concerned.*"

In Howard v. State of North Carolina, 191 U. S., 126 (48-122), the Court said:

"We premise that the trial was had in a *State court and therefore our range of inquiry* is not so broad as it would be if it had been in *one of the Courts of the United States.*. The highest court of the State has affirmed the validity of the proceedings in that trial, and we may not interfere with its judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial. * * * It does not appear that the *Federal character of the question was presented to the supreme court of the State, although in the opinions of the supreme court the questions themselves were fully discussed. But in the absence of any claim to protection under the Federal Constitution, we are compelled to hold that we have no jurisdiction*

in the case coming from the supreme court of the State, and the writ of error will be dismissed."

In Brooks v. Missouri, 124 U. S., 394 (31-456), the Court said:

> "In Spies v. Illinois, 123 U. S., 131, it was said that, 'to give us jurisdiction under section 709 of the Revised Statutes because of a denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such right, title, privilege or immunity was specially set up or claimed, at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more.'
>
> *"Applying that rule to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the Constitution, laws or treaties of the United States.* * * * Others of the exceptions taken at the trial relate to rulings by means of which it is claimed the defendant was deprived of an impartial jury, but it does not appear to have been claimed that any provisions of the Constitution of the United States guaranteed to him such a jury. *That the sixth article of the amendments contain no such guaranty as to trials in State courts has always been held."*

In Baldwin v. Kansas, 129 U. S., 57 (32-641), this Court re-affirmed the decision in Spies v. Illinois, using the indentical language quoted in the case of Brooks v. Missouri, *supra*, and said:

"A still more conclusive answer on this point is that no objection was made to the form of the oath when it was administered or at any other time prior to its presentation in this Court. If there was any irregularity in this respect, it should, and probably would have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of oath so well understood, and which is in universal use in all the courts of the State; *but if the form of the oath was defective, the attention of the Court should have been called to it at the time the oath was taken, so that it might have been corrected. A party can not sit silently by and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated in the bill of exceptions, in order that this Court may see whether or not it is sufficient. This was not done.*

"This statement of the condition of the record shows that no Federal question is presented, in regard to the oath administered to the jurors, of which this Court can take jurisdiction. Section 709 of the Revised Statutes provides that a final judgment in any suit in the highest court of a State, in which a decision in the suit could be had, where any title, right, privilege or immunity is claimed under the Constitution, and the decision is against the title, right, privilege or immunity 'specially set up or claimed' by either party, under such Constitution, may be re-examined and reversed or affirmed, in the supreme court, upon a writ of error. *In the present case, the record does not show that, at the trial before the jury, any title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed.* No objection was taken to the form of the oath at the trial, nor at the making of the motion for a new trial before the trial court, nor at

the making of the motion for arrest of judgment in that Court. *The point was first suggested in the supreme court of the State. That Court, it appears, refused to consider the objection, on the ground that it was not taken at the trial. For that reason we also can not consider it.*"

Citing Spies v. Illinois, 129 U. S., 131.

X.

ASSUMING THAT THE TRIAL COURT ASKED THE JUROR, ALEXANDER, THE QUESTION HE IS SAID TO HAVE ASKED HIM, IN THE ABSENCE OF THE PLAINTIFF IN ERROR, *THE RECORD PRESENTS NO FEDERAL QUESTION.*

IT WAS BY AGREEMENT AND NO OBJECTION OR EXCEPTION TAKEN THERETO. THIS QUESTION WAS NOT EVEN PRESENTED TO THE TRIAL COURT ON MOTION FOR A NEW TRIAL.

THE KENTUCKY COURT OF APPEALS BEING A COURT OF REVIEW, HAD NO ORIGINAL JURISDICTION TO PASS ON SAID QUESTION IN THE ABSENCE OF AN OBJECTION AND EXCEPTION IN THE TRIAL COURT.

BEFORE THIS COURT WILL REVIEW ANY FEDERAL QUESTION, THE PLAINTIFF IN ERROR MUST HAVE PRESENTED IT IN THE HIGHEST STATE COURT, AND IT MUST HAVE BEEN DECIDED THERE, ADVERSELY TO HIM. UNDER SECTION 281 OF THE CRIMINAL CODE THE TRIAL COURT IS NOT ONLY THE HIGHEST COURT, BUT THE ONLY COURT THAT COULD PASS ON SAID QUESTION.

"The inquiry, then, is, is this such an error as will, under the statute, authorize a reversal?

"In felony cases, section 340 of the Criminal Code, which went into effect January 1st, 1877, provides:

"A judgment of conviction shall be reversed for any error of law to the defendant's prejudice, appearing on the record.

"By an act approved March 4th, 1880, that section was amended so as to read: 'A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.'

"If this amendment is ordinarily to have any effect, it must be construed to mean that the power of this Court to reverse in felony cases depends upon two things: *First.* That an error appear on the record. *Second.* The Court must be satisfied from consideration of the whole case that the substantial rights of the accused have been prejudiced by the error complained of."

XV.

JURISDICTION—COURT OF APPEALS.

Constitution of Kentucky, section 110, reads:

"Section 110. *Jurisdiction and Powers of—The Court of Appeals* SHALL HAVE APPELLATE JURISDICTION ONLY, *which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law.* Said Court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdictions."

Sections 280, 281 and 340 of the Criminal Code read:

"Section 280. *Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 281. *The decisions of the Court* upon *challenges to the panel,* and *for cause,* upon *motions to set aside an indictment,* and *upon motions for a new trial, shall not* BE SUBJECT TO EXCEPTION.

"Section 340. *A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.*"

In Kennedy v. Commonwealth, 14 Bush, 344, the Court in construing above sections, used the following language:

"As the appellant had no right to except to the order overruling his motion for a new trial, he had no right to have a bill of exceptions, exhibiting anything brought into the record for the first time on that motion, and as he had no right to have such a bill of exceptions, it constitutes no part of the record, and can not be considered by this Court; and consequently we can not know that any such error as that complained of was committed. We have no power to look into a bill of exceptions which the Legislature has declared should not be allowed, or into a general bill for matters not the subject of exception, and then to reverse for an alleged error thus improperly appearing in the transcript.

"We must reverse for any error of law appearing in *the record* to the prejudice of the appellant, *but this only applies to such errors as the party had a right to manifest by bill of exceptions; and as a bill of exceptions, not only not authorized, but expressly prohibited by law, is no part of the record, an error in respect to any of the matters under section*

281, *can not be excepted to is not an error appearing 'in the record' within the meaning of section* 340."

In Morgan v. Commonwealth, 14 Bush, 114, the Court said:

"It is also objected by appellant that the Court refused to sustain his challenge for cause to Green and Million, two of the jurors by whom he was convicted. It is useless to discuss the question as to whether the causes of challenge should have been sustained, for by section 281 of the Criminal Code, 'the decision of the Court upon challenges to the panel, and for cause, shall not be subject to exception.'"

In Terrell v. Commonwealth, 13 Bush, 250, the Court said:

"Section 340 of the Code provides: 'A judgment of conviction shall be reversed for any error of law, to the defendant's prejudice, appearing in the record.'

"Sections 280 and 281 read:

"Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions of the next section.

"Section 281. The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motion for new trials, shall not be subject to exception.

"Construing these sections, 340 and 280 and 281, together, *it seems to us clear that we have no power under the present Code to reverse the appeal of either party for error in decision upon challenges to the panel, or for cause, or upon motions to set aside an indictment, or for a new trial.*"

In York v. Commonwealth, 82 Ky., 362, in construing these sections the Court said:

> "If it be true that the trial jury were not properly selected by their names not being drawn from the regular panel, * * * yet he can not rely upon these facts for a reversal in this Court, because, even admitting that they would constitute reversible errors if properly presented; *yet the record discloses the fact that he made no complaint upon this score until the motion for a new trial was made, and that he then, for the first time, excepted to such action; and a decision of the lower court upon a motion for a new trial is not subject to exception.*"

Hence it will be clearly seen from decision, *supra*, that the Court of Appeals of Kentucky has no jurisdiction to review a decision of the trial court on a challenge to a juror for cause, and the discharge of the juror, Alexander, upon a challenge for cause by the Commonwealth was final, and was subject to neither exception, nor review by the Appellate Court. It would have been, not the erroneous exercise of a power, but the usurpation of a power withheld from said Court, under the law if the Court of Appeals had reviewed the decision of the lower court.

XVI.

RECORD MUST SHOW OBJECTION AND EXCEPTION.

In order to give the Appellate Court jurisdiction, under the laws of Kentucky, there must be an objection and exception to the decision of the trial court at the time

said decision is made, and the substantial rights of the accused must be prejudiced thereby.

CRIMINAL CODE.

"Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.

"*Section* 281. *The decisions of the Court* upon *challenges to the panel,* and *for cause,* upon *motions to set aside indictment, and upon motions for a new trial, shall not be subject to exceptions.*

"Section 282. *The exceptions shall be shown upon the record, by a bill of exceptions, prepared, settled* and signed as provided in Code of Practice in civil cases."

CIVIL CODE.

"Section 333. 1. An *exception* is an *objection taken to* a decision of the Court upon a matter of law.

"2. A party may, without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.

"3. But a party can not except to a decision made at the instance of the adverse party unless objection shall have been made to the motion, offer or request of the adverse party.

"Section 334. *The party objecting must except when the decision is made;* and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the Court."

Branson v. Commonwealth, 92 Ky., 330.
Loving v. Warren Co., 14 Bush, 316.
Cook v. Commonwealth, 13 R., 702.
Brooks v. Commonwealth, 12 R., 403.

In Branson v. Commonwealth, 92 Ky., 330, the Court said:

> "Where the step is proposed to be taken by the other party it should *be objected to,* in order to specially call the Court's *attention to it; and if its ruling be adverse to the objecting party, he must except.* This is the proper practice. *It is the express rule of the present Civil Code, and a proper conduct of criminal cases requires, in our opinion, the same practice. The provisions of the Criminal Code admit, and it seems to us require, such a construction.* The trial judge should be made aware when one side proposes to take a certain step in a case that it is objected to upon the other side. *This is fair to him.* The matter is likely then to receive more careful attention from him. *The party ought not to wait, as if he were consenting, and then afterward merely except to what was done. He should also except when the decision is made, else it can be fairly inferred that, although objecting when the step was proposed by the adverse party, yet that he has acquiesced in the Court's decision as correct."*

In Loving, &c. v. Warren County, 14 Bush. 320, the Court said:

> *"That an objection must be made to an instruction given on the motion of the adversary as well as an exception, so as to make the error complained of a ground for reversal in this Court, is as much required by this provision of the Code as any other offer, motion or request."*

In Cook v. Commonwealth, 13 R., 702, the Court held:

> "In the absence of a bill of exceptions the action of the Court in the conduct of the trial will be presumed to have been correct, and the evidence sufficient to support the verdict."

In Brooks v. Commonwealth, 12 R., 403, the Court said:

> "The decision of the trial court upon a motion for a new trial is not subject to exception, and can not therefore constitute ground for a reversal by this Court.
>
> "The other ground of complaint is, that the State was allowed to introduce, as a witness against him, one jointly indicted with him without first entering a *nolle prosequi* as to the witness. It is evident, however, that the bill of exceptions does not contain all the testimony introduced upon the trial, or show all that then occurred. In the absence of a bill showing all the evidence, the second point urged can not be considered."

So, if the trial judge did ask juror Alexander said question in the absence of the plaintiff in error, *there was not only no objection to the trial judge asking him whether or not he said to Hackett,* "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," but it was done without objection or exception by the plaintiff in error, and there was nothing, so far as the trial court asking Alexander the question, before the Appellate Court for review, and it was, under the law, without jurisdiction to review or consider the alleged error.

XVII.

JURISDICTION OF THE TRIAL COURT.

The trial (circuit) court being the highest Court in the State of Kentucky having jurisdiction to decide upon a challenge to a juror for cause, and its decision being final, and same not being subject to review by the Ap-

pellate Court, and no objection or exception having been made or taken to the action of the trial judge in asking the juror Alexander whether or not he said to Ben Hackett, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," and the Court of Appeals of Kentucky, being without jurisdiction either to hear or review said matter, it follows, that if the plaintiff in error has been denied any Federal right—which we deny—he has never presented it to the highest and only Court in the Commonwealth having jurisdiction to hear and decide it, and such alleged right has not been decided adversely to plaintiff in error by any Court whatever.

This Honorable Court will not undertake to confer jurisdiction on the Kentucky Court of Appeals to consider said question, nor to regulate or prescribe the jurisdiction of the several courts of that Commonwealth. This question not having been presented in the State court having jurisdiction of the question, and hence not decided against plaintiff in error, it follows, in view of the following decisions of this Honorable Court that there is no question here for review by this Honorable Court.

The writ of error from this Honorable Court is to the Kentucky Court of Appeals; and in so far as the errors assigned refer to the juror, Alexander, it is to review a question which said Kentucky Court of Appeals had no jurisdiction to review, and under the laws of Kentucky it was prohibited so to do.

The alleged constitutional right had not been set up or claimed in the trial court, and its attention not having been called to it, it had not ruled thereon, and there was

error appearing on the record, whereby the substantial rights of Hopt were prejudiced.

The case at bar has been brought here on writ of error to the State court of Kentucky; this Honorable Court's jurisdiction only extends to such Federal questions as appear from said record, whereby the rights of the plaintiff in error have been prejudiced.

XIII.

THE RECORD SHOWS THAT APPELLANT WAS PRESENT DURING TRIAL OF CHALLENGE.

J. C. Alexander, the juror, was challenged in the presence of the appellant in error; the affidavit of B. F. Hackett was filed in the presence of plaintiff in error; the motion to discharge Alexander was made in his presence; plaintiff in error objected to said motion to discharge Alexander; said motion and the objection were argued by counsel in his presence; Alexander was discharged by the Court in the plaintiff's presence, to which ruling of the Court he then excepted, and moved the Court to discharge the entire panel.

The bill of exceptions (R., 34) states:

> "That on said motion to discharge said Alexander and before he was discharged, by agreement with counsel upon either side, the Court *privately* examined said Alexander as to the truth of the *charges* as to what he said to said Hackett, while he, Alexander, was in custody of the sheriff."

The order (R., 32) states that:

> "It was agreed by counsel on either side that the

> Court might, in the absence of the defendant and counsel, question said Alexander as to the truth of the statements contained in said Hackett's affidavit, that he said to Hackett while in custody of the sheriff, 'Hello, Ben,' &c." * * *

The record shows that the Court did examine said Alexander, but fails to show what took place on said privy examination; that said Alexander admitted he made the statement, but claimed he did it in a jocular way. It may be presumed that Alexander was addressing the Court, where the record states: "The said Alexander having admitted the truth of said statement, but claims that said statement was made in a jocular way."

Order, R., 32.

Affidvit of Ben Hackett, R., 32.

Bill of exceptions, R., 33-34 and 35.

But the record does not show and it can not be presumed that the trial court heard any evidence on the trial of said challenge, in the absence of plaintiff in error.

It is stated by counsel for plaintiff in error (brief, 101 and 104) that plaintiff, Howard, "was in custody—prison"—when the challenge to Alexander for cause was made and decided by the Court, when in fact the record shows that he was present.

By the opinion of the Kentucky Court of Appeals herein, and the decisions cited in said opinion, and referred to elsewhere in this brief, the rule requiring the defendant in a felony case to be present during the trial has never been rigidly enforced in this State, and the rigid enforcement of section 183 of the Criminal Code has been relaxed and not enforced unless it is shown by

the record that by reason of his absence his substantial rights had been prejudiced.

It clearly appears from the record herein that the plaintiff in error was not only present during the trial of said challenge, but that his substantial rights were not prejudiced by the discharge of Alexander; and that his constitutional right was secured to him in the substitution of an impartial juror instead of Alexander.

XIV.

THE RIGHT OF APPEAL IS NEITHER A CONSTITUTIONAL RIGHT NOR A RIGHT UNDER THE COMMON LAW.

Cooley's Blackstone, 3rd edition, volume 4, page 391.

Revised Statutes (Ky.), chapter 27, article 1, section 1 (1852).

Criminal Code of Practice (1854), 274-275-326 and 333.

Montee v. Commonwealth, 3 J. J. Mar., 132.

Commonwealth v. Mitchell, 3 J. J. Mar., 630 (decided in 1830).

Commonwealth v. Craig, 15 B. M., 536.

Cornelius v. Commonwealth, 15 B. Mon., 545.

Conley v. Commonwealth, 17 B. Mon., 409.

Rutherford v. Commonwealth, 78 Ky., 639.

No right of appeal existed at common law, in cases of conviction of an accused charged with a felony. No right of appeal from a conviction in a State court for a State offense is guaranteed the accused by the Federal Constitution, or any law of the United States. No right of appeal is guaranteed the accused from conviction in the

State courts for a State offense, by the Constitution of Kentucky. On a conviction of an accused in the State courts of Kentucky he has a statutory right to have the rulings and decisions of the State court, on specific questions, reviewed by the Appellate Court.

In the case of Montee v. Commonwealth, 3 J. J. Mar., 132, and likewise in the case of Mitchell v. Commonwealth, 3 J. J. Mar., 630, both decided in the Kentucky Court of Appeals in the year 1830, *it was held that a writ of error to the Court of Appeals in a felony case should be dismissed, as that Court had no jurisdiction to review the proceedings, or reverse the judgment of inferior courts for any cause or alleged error.* Revised Statutes chapter 27, article 1, section 1 (1852), in defining the jurisdiction of the Court of Appeals of Kentucky, said:

> "The Court of Appeals shall have jurisdiction, by appeal or writ of error, in matters of law, from the final order, judgment or decree of any inferior court, *except as otherwise provided in this chapter.*
>
> "1. *No writ of error or appeal shall lie in cases of felony.*" * * *

This law was amended by the Criminal Code of March 9th, 1854, and the jurisdiction of the Court of Appeals enlarged and extended by the following sections thereof, to-wit:

> "Section 274. Upon the *trial of Criminal* or penal prosecutions *either party may except to any decision of the Court by which the substantial rights of such party are prejudiced,* SUBJECT TO THE RESTRICTIONS IN THE NEXT SECTION.
>
> "Section 275. The *decisions of the Court upon challenges to the panel, and for cause, upon motions*

to set aside an indictment and upon motions for a new trial, shall not be subject to review.

"Section 326. *The Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.*

"Section 333. A judgment of conviction shall only be reversed for the following errors of law to the defendant's prejudice appearing on the record:

"1. An error of the circuit court in admitting or rejecting important evidence.

"2. An error in instructing or in refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge."

Commonwealth v. Craig, 15 B. Mon., 536 seems to have been the first case coming to the Court of Appeals for a construction of the part of the Criminal Code of 1854, referred to above, and giving it the proper construction the Court said:

"At the time the judgment was rendered, according to the then existing law, no appeal was allowed in cases of felony, but the judgment of the circuit court in such cases was final and irreversible."

In the case of Cornelius v. Commonwealth, 15 B. Mon., 545, the Court in defining the powers of the Kentucky Court of Appeals, said:

"The appellant was indicted for murder and found guilty. *A judgment of conviction can only be reversed for the following errors of law to the defendant's prejudice appearing on the record:*

"1. An error in the circuit court in admitting or rejecting important testimony.

"2. An error in instructing or refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge.

"(1). *No objection to any of the proceedings in the circuit court, which does not come under one of the foregoing heads, can be relied upon in this Court, or made available for the reversal of a judgment of conviction. Consequently the action of the circuit court in overruling the motion for a new trial, so far as the motion was based upon the alleged fact that one of the jurors had expressed an opinion adverse to the prisoner previous to the trial, of which he and his counsel were uninformed until the trial was concluded, is not a proper subject of inquiry on this appeal.*"

In the case of Conley v. Commonwealth, 17 B. Mon., 409, it was held that the jurisdiction of the Court of Appeals to review a judgment of a lower court in felony cases, was limited to the review of the errors enumerated in the Criminal Code; and all other rulings of the Court were not proper subjects of review on an appeal to the Court of Appeals.

In Rutherford v. Commonwealth, 78 Ky., 639, the Court said:

"It must, however, *be borne in mind that in this Court the accused has no constitutional rights. Our power to review the rulings of the lower court in such cases is derived from the statute, and must be exercised within the statute.* Whatever our views may be in any particular case, as to whether the accused has had such a trial as is guaranteed to him by the Constitution, *we can not revise the rulings of the trial court unless the authority is conferred by the statute. For constitutional rights the appeal is to the trial court.*

for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained."

Section 183 of the Criminal Code reads:

"If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; *unless his bail appear personally in Court*, and *consent* that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. *If he escape from custody after the trial has commenced, the trial may either be stopped or progress to a verdict, at the discretion of the Commonwealth's attorney;* but judgment shall not be rendered until the presence of the defendant is obtained."

Collier v. Commonwealth, 110 Ky., 518.
Meece v. Commonwealth, 78 Ky., 586.
Willis v. Commonwealth, 85 Ky., 68.
Allen v. Commonwealth, 86 Ky., 645.
Yarbrough v. Commonwealth, 89 Ky., 155.
Hite v. Commonwealth, 14 R., 309.
Williams v. Commonwealth, 78 Ky., 96.

In Collier v. Commonwealth, 110 Ky., 518, the Court in construing section 183 of the Criminal Code, and section 11 of the Constitution, by Judge O'Rear, said:

"1. The Constitution and laws of this State *guaranty* to any person accused of crime the right to a public trial, and the right to be confronted by the witnesses appearing against him. (Section 11, Constitution; section 183, Criminal Code Practice.) This means that no man can be deprived of his liberty by judgment of a Court unless by a public trial, and unless the witnesses accusing him appeared in person at the trial, at which he could and should also be present. This much the laws of the land guaranty to him, but *they do not go further to allow him to voluntarily and unlawfully absent himself from the trial after it has regularly and legally*

begun, and *then for such absence allow the claim that his constitutional privileges have been ignored or abridged by the Court.* If he has suffered *the lack of enjoyment of the constitutional right of being confronted by his witnesses, it is because he himself refused to be confronted. There was neither failure of due provision of legal opportunity nor of fair privilege afforded by the Court for the defendant to meet his accusers face to face at the trial.* Every step required by a regardful observance of these ancient and invaluable guaranties of fair trials was duly and fairly taken by the Court's officers. *The accused, by personally, voluntarily and unlawfully abandoning the trial, deprived himself of whatever value the privilege of personal presence would have been to him.* THE TRIAL HAVING BEEN BEGUN WHEN THE JURY WAS SWORN (Williams v. Commonwealth, 78 Ky., 93; Gaskins v. Commonwealth, 97 Ky., 30 S. W., 1017; Huff v. Commonwealth, Ky., 42 S. W., 907, 19 Ky., L. R., 1064), the Commonwealth's attorney doubtless construed that to withdraw the juror without the defendant's consent would operate as a bar to another trial for the same offense, the defendant having been once in jeopardy. It was by statute clearly within his discretion, at least, whether the trial should proceed to a verdict." * * *

In Meece v. Commonwealth, 78 Ky., 586, one of the contentions of appellant was, that after the case had been submitted to the jury, they returned into Court, *and asked and received further instructions, during all which time appellant was kept in jail, and not permitted to be present in Court,* and in passing on this the Court said:

"The jury after retiring came into Court and asked for further instructions. *The Court declined to give any, but, in the presence of the counsel for the prisoner, inserted in the last instruction noticed, the words,* 'IN ARRIVING AT A CONCLUSION ON THIS POINT, THE JURY MUST TAKE INTO CONSIDERATION ALL THE FACTS AND CIRCUMSTANCES PROVEN IN THE CASE.'

"The *accused was absent at the time,* and it is urged that for this reason the judgment should be re-

versed. While we recognize the fact that the accused, when on trial for a criminal offense, should be present during the entire trial, and that no evidence should be heard or instructions given or amended without his presence, either before or after the submission of the cause to the jury, *still this Court is only authorized to reverse in cases where the substantial rights of the accused have been prejudiced in the Court below,* and in order to ascertain whether errors have been committed to the prejudice of the accused, the facts as well as the law of the case should be considered. While one charged with a criminal offense has the constitutional right to be tried by a jury, THE RIGHT OF APPEAL FROM THE VERDICT AND JUDGMENT AGAINST HIM DOES NOT EXIST, *except by reason of the legislation of the State on the subject, and when permitting an appeal, the law-making power has the right to determine for what cause a reversal may be had.*"

In Willis v. Commonwealth, 85 Ky., 68, *where one of the errors set out was the Court's ruling that as a jury had not been sworn, the trial had not begun, on which the Court of Appeals said:*

> "*The decisive inquiry then is, when does the trial of an indictment for felony, in the meaning of section* 229 *begin? It seems to us, it can not, with propriety* or accuracy, be said to *begin until the issue is formed and the jury sworn to try it.* For, as has been held by this Court, the defendant can not be regarded as being in jeopardy of his life or liberty until then. EVERYTHING DONE PREVIOUSLY IS MERELY PRELIMINARY TO THE TRIAL."

In Allen v. Commonwealth, 86 Ky., 642, the Court said in construing section 183 of the Criminal Code:

> "The Criminal Code, by section 183, provides that the defendant must be present '*during* the trial' of a felony. This is but declaratory of the common law. *The trial begins with the swearing of the jury, and ends when the verdict is rendered.*"

In Yarbrough v. Commonwealth, 89 Ky., 155, as to the presence of the accused when the jury was discharged after failing to agree, the Court said:

> "We fail to see why the accused is to be regarded as having been in jeopardy, and the mistrial as an end virtually of the prosecution, or as equivalent to an acquittal, because he was not present when the jury were discharged, any more than it would have been if he had been present. It was still merely a mistrial by a failure of the jury to agree; moreover, *he was not prejudiced by the disregard of his constitutional right to be present at every stage of the trial, and in such case this Court will not reverse the judgment.*"
>
> Meece v Commonwealth, 78 Ky., 586.

In the case of Hite v. Commonwealth, 14 R., 308-9, where during the trial *appellant was compelled to leave the courtroom several times during progress of the trial (felony), and during which times the trial progressed,* and on appeal this was set up as a ground for reversal. In passing on this ground the Court said:

> "It seems that during the progress of the trial the appellant's stomach became so much disordered as to cause occasional vomiting, and the officer having him in charge was compelled to take him from the courtroom to let him vomit when the vomiting spells came on. The appellant contends here that the Court should have suspended the trial of the case until appellant could have gotten relieved of his sickness.
>
> "Now it is a fact that the appellant did not, by himself nor able counsel, ask the Court to suspend the trial until he recovered from his sickness. It is true that the counsel for the appellant privately called the attention of the Court to the fact that the appellant was suffering in the manner indicated, which the Court seems to have observed, and stated that he had sent for the jail physician to examine him, &c.

"The physician soon appeared and made an examination and gave the appellant some medicine, and reported that if the medicine acted favorably the appellant could proceed with the trial. The medicine did soon give relief, and the Court did proceed with the trial.

"*Now the fact is that appellant did not, by himself or counsel, move the Court to suspend the trial on account of the sickness of the appellant, and his inability to give the case proper personal attention on that account. Nor does it appear that the substantial rights of the appellant were in anywise prejudiced by progressing with the trial while he was sick.* He got over that sickness during the progress of the trial in time to look over what had occurred during his sick spell (it does not appear that the sickness made him oblivious to what had occurred during its continuance), and to remedy any omission that might have been made during the sickness and in consequence of it; *in fact none had occurred so far as the record shows.*"

In Williams v. Commonwealth, 78 Ky., 93, the Court also adopts the same rule, in construing said sections referred to, especially as to the beginning of the trial, and in so doing, said:

"A person is in legal jeopardy when he is put upon trial before a Court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, *and a jury has been charged with his deliverance.*"

Bishop on Criminal Laws, sections 1013, 1014.

Also see following cases cited in above, and to the same effect:

Tye v. Commonwealth, 3 R., 59.

Huff v. Commonwealth, 19 R., 1066.

Gaskins v. Commonwealth, 97 Ky., 496.

Under the foregoing decisions of the Kentucky Court

of Appeals and the interpretation and construction placed on section 183 of the Criminal Code, and section 11 of the State Constitution, the *trial of a felony case does not begin* under the criminal procedure in Kentucky until the jury is selected, sworn and charged with the deliverance of the accused; and as said in Willis v. Commonwealth, *supra,* "everything done previously, is merely preliminary to *the trial,*" and under this construction, regardless of the holdings of other Courts, *the trial had not begun when the juror, Alexander, was challenged by the Commonwealth and thereafter discharged by the Court;* and if the record showed that plaintiff in error was absent when the Court did question Alexander as to the alleged statement to Hackett—which we contend it does not—the plaintiff in error was not thereby denied any constitutional rights, and was not, and could not, have been prejudiced thereby.

XX.

CONSTRUCTION OF SECTION 281 OF THE CRIMINAL CODE OF KENTUCKY BY THE KENTUCKY COURT OF APPEALS.

Rutherford v Commonwealth, 13 Bush, 608.
Terrill v. Commonwealth, 13 Bush, 246.
Smith v. Commonwealth, 100 Ky., 135.
Collier v. Commonwealth, 110 Ky., 518.

Criminal Code, section 281:

> "The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exception."

In Terrell v. Commonwealth, 13 Bush, 246, appellant relied mainly for a reversal of the judgment against him on the ground that the grand jurors by whom the indictment was found were not selected in the proper manner *as required by law.*

Upon this question the Court said:

> "Section 340 of the Code of 1877 provides: 'A judgment of conviction shall be reversed for any error of law, to the defendant's prejudice, appearing in the record.'
>
> "Sections 280 and 281 read as follows:
>
> "'Section 280. Upon the trial of criminal or penal prosecutions either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.'
>
> "'Section 281. The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for new trials, shall not be subject to exception.'
>
> "Construing these sections, 340 and 280 and 281, together, it seems clear to us that we have no power under the present Code to reverse on the appeal of either party for error in decisions upon challenges to the panel, or for cause, or upon motions to set aside an indictment, or for a new trial."

In Rutherford v. Commonwealth, 13 Bush, 608, the Court again construed section 281, Criminal Code, in connection with relative sections, and in the opinion said:

> "Section 340 of the Criminal Code provides, that 'a judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record.' But sections 280 and 281 provide that decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial, shall not be subject to exceptions; and in Terrell's case (13 Bush, 246) we held, that as no exception could be taken to the decisions above enumerated, this Court

had no jurisdiction to inquire into alleged errors therein. *We are therefore of the opinion that we have no jurisdiction to revise the action of the circuit court in respect to the appellant's challenges for cause.*"

In Smith v. Commonwealth, 100 Ky., 137, the following language is used:

"A further objection is the refusal of the trial court to grant a new trial upon the affidavit of Polson as to the evidence which he states he had refused to disclose until after the trial. A sufficient answer to all of the objections mentioned is found in section 281 of the Criminal Code. 'The decisions of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment and upon motions for a new trial shall not be subject to exceptions.'"

Citing Terrell v. Commonwealth, 13 Bush.
Rutherford v. Commonwealth, &c., 13 Bush.

In Collier v. Commonwealth, 110 Ky., 518, the appellant was convicted, and on the prosecution of an appeal relied upon the following ground in connection with others:

"4th. That the motion and grounds for a new trial, and the affidavits in support thereof, should at least have been allowed to be filed, and been acted upon by the Court."

In passing upon this contention for reversal the Court said:

"*Section* 281 *of the Criminal Code gives to the trial court an unreviewable discretion in acting upon motions and grounds for new trials in criminal cases.* A defendant convicted of crime is entitled to file his motion and grounds for a new trial at any time before final judgment, and has the right to have the motion and the grounds passed upon by the trial court. *It is not enough that this Court may consider*

no ruling of said Court before the Appellate Court for review.

Said Court of Appeals had no jurisdiction to review the discharge of Alexander, under section 281 of the Criminal Code.

In Ex parte Spies, 123 U. S., 131 (31-91), this Court had under consideration the competency of a letter received by Spies from his co-conspirator, Most, which had been illegally seized by the officers, and said:

> "The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this Court. It was not made on the trial in the Court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should have moved to exclude or oppose its admission on the grounds that it was obtained by such illegal seizure. This was not done, and therefore we can not consider the constitutional question supposed to be involved.
>
> "Even if the Court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the supreme court of the

State was reviewing the decision of the trial court, it must appear that the claim was made in that Court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioner, *a question of waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim.* If the right was not set up or claimed in the proper Court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and therefore no foundation is laid under this objection for the exercise of our jurisdiction."

XVIII.

EITHER GROUND SHOWN BY THE AFFIDAVIT OF HACKETT, ON THE MOTION AND CHALLENGE TO THE JUROR, ALEXANDER, IS SUFFICIENT, IN THE EXERCISE OF THE DISCRETION OF THE TRIAL COURT, FOR THE DISCHARGE OF ALEXANDER.

The case of Max Klinger v. Missouri, 80 U. S., 257 (20-635), was a case where plaintiff in error sought a reversal because the trial court discharged a juror over the objection of Klinger, after he had been accepted, but before the jury was sworn, because one juror, Andrew Park, refused to take the "Test Oath."

Upon his examination by the Court the juror stated and "declared that during the late rebellion he was a sympathizer with the Confederate cause, and earnestly

desired its success; that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South; that his heart was with the Southern cause and that for these reasons he could not conscientiously take the proffered oath."

The Court, thereupon, of its own motion, over the objection and exception, and against the consent of said Klinger, discharged said juror.

In passing on this question the Court said:

> "Now it does not clearly appear from this statement there made that the juror was discharged 'for no other reason than that he declined to take the oath.' The reasons assigned by him for not taking the oath were twofold: First, that he was a rebel in his sympathies during the war; and, second, that he was so still, and stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the Court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws.
>
> "Had the juror refused to take the oath simply because he had sympathized with or aided the rebellion during the war, and had he been discharged on that account, then the questions could have fairly arisen of which this Court could take cognizance. The repugnancy of the test oath to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, etc., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the loyal and upright discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely if he had done that there

could have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test oath. It certainly would have been in the discretion of the Court, if not its duty, to discharge him. And so we think it was in this case.

"The rules which govern the action of this Court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the Court did in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this Court will not take jurisdiction, even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one it will be presumed that the State Court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction. * * * In this case it appears that the Court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It can not, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the State Constitution, which requires a juror to take the oath."

So it is the contention of the State that while it does not appear from the record whether the trial court discharged Alexander, because he denied on his *voir dire*

that he had formed or expressed an opinion as to the existence of a conspiracy, and the guilt or innocence of the parties charged—including plaintiff in error—or because he had, almost immediately after being sworn and admonished by the Court not to talk to any one, including the other jurors about the case, disregarded his oath and the admonition of the Court, in saying to Hackett, "Hello, Ben, I am glad they cut you off of this jury, as I did not want to serve on this jury with you," or whether it was for both.

Either ground was sufficient to authorize a court, in the impartial administration of justice and the law, to discharge any juror who would so conceal his bias, or show such utter disregard of his oath and the admonitions of the Court.

XIX.

UNDER THE COMMON LAW A TRIAL BEGAN WHEN THE CASE WAS OPENED FOR THE CROWN.

As to the time when a trial for a felony began, under the common law, we quote the following from Proffat on Jury Trials, section 208:

> "The mode of procedure in criminal cases, according to Chitty, was, that when a full jury had been obtained and sworn, the clerk directed the crier * * to count the jury, who having done so, said to the jury 'twelve good men and true, stand together and hear your evidence;' after which the other jurors summoned were discharged by the Court. Then the clerk directed proclamation to be made by the crier in the following form: 'If any one

can inform our lords, the king's justices, the king's sergeant, or the king's attorney on this inquest to be taken between our sovereign lord, the king, and the prisoners at the bar, of any treason, murder, felony, or other misdemeanor, committed or done by them, let them come forth and they shall be heard; the prisoners stand at the bar upon their deliverance, and all others that are bound by recognizance to give evidence against the prisoner at the bar let them come forth and give their evidence, or else they forfeit their recognizance.'

"*After this proclamation the trial commences by the prosecuting officer opening the case for the Crown.*"

So the Kentucky Court of Appeals hold that the trial begins when the jury is sworn and charged with the deliverance of the accused.

Under the construction given section 183 *of the Criminal Code the trial of an accused begins when the jury is sworn and charged with the deliverance of the accused; and it is only after the accused has been placed in legal jeopardy that he has a constitutional right to be present.*

Constitution of the Commonwealth of Kentucky, section 11, reads:

"In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law

These amendments of the Constitution of the United States are limitations and restrictions upon the powers of the Federal Government; and this Honorable Court has so often said that these amendments were no restrictions or restraints upon State action, in prosecutions for offenses against the State in State courts, that we feel sure there is no Federal question presented by either.

It is also claimed that section 281 of the Criminal Code of Kentucky is in conflict with his rights under the Constitution of the United States, the Constitution of Kentucky, the common law obtaining in Kentucky, and more especially in violation of amendments 5, 6 and 14 of said Constitution of the United States, *because same deprives the defendant (plaintiff in error) of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in a case of felony.*

Will the distinguished counsel point out the provisions in the Constitution of the United States, and the Constitution of the State of Kentucky, or of either, guaranteeing to the accused, in a felony case, in a trial in the State court, the right to except to the ruling of the trial court on a challenge to the panel, or to a juror for cause?

Or will he point out where such right existed at common law, and what tribunal existed then, for the review of said exceptions in such cases?

The right of appeal in Kentucky is not a constitutional right, but it is given by statute, and in conferring this right the State prescribed the terms and conditions upon which said right might be exercised and enjoyed; and by section 281 of said Criminal Code it denied the right of exception to the accused, in felony cases, upon the decisions of the trial court upon challenges to the panel, or to a juror for cause. No right has been guaranteed by either of said Constitutions, nor did any exist at com-

mon law, and being denied by the laws of Kentucky, it follows that plaintiff in error has no such right, and his conviction was due process of law, and he has had the equal protection of the law, and the alleged Federal question does not in fact or law exist.

It is also claimed that the construction given in the opinion of section 281, Criminal Code, is erroneous and prejudicial to the rights of the plaintiff in error, in this; that said section relates to challenges made to said jury before the acceptance of the jurors, *and not to challenges made after said jurors have been accepted by both parties.*

Section 202 of the Criminal Code of Kentucky, which reads: "It (challenge) must be taken before he (juror) is sworn in chief, *unless the Court, for good cause*, permit it to be made at any time before the jury is completed," authorizes this construction. Will the erroneous construction of a State statute by a State court, when such construction does not bring it in conflict with the United States Constitution, or laws, or any treaty thereof, constitute a Federal question for review by this Honorable Court?

It is also claimed that section 281, Criminal Code, relates to challenges made and heard in the presence of the accused, and not to challenges made or heard in the absence of the accused; and if said section is construed to apply to challenges either made or heard in the absence of accused, it is in conflict with the Constitution of the United States, the common law operative in Kentucky, and deprives the plaintiff in error of his liberty without due process of law, and in violation of the rights of trial by jury.

The challenge to the juror, Alexander, was neither made nor heard in the absence of plaintiff in error, as

shown conclusively elsewhere in this brief. As said by this Honorable Court in American Book Co. v. Kansas, 193 U. S., 613:

> "The duty of a court is to decide actual controversies by judgment, and not to give opinions on abstract or mooted questions."

But waiving this objection, if we apply the same test to this section as applied to section 7, we will fail to find any Federal question therein.

Upon this motion and petition for rehearing the Kentucky Court of Appeals filed its response (R., 78) which reads:

> "The questions called to our attention in the petition for rehearing under the Constitution of the United States were considered by the Court on the original hearing, and we adhere to the conclusion there reached, that no right of appellant under the fifth, sixth, or fourteenth amendment of the Constitution of the United States has been violated."

Hence, if we are correct in our conclusions, the Kentucky Court of Appeals correctly decided that the plaintiff in error had not been deprived of any right under the fifth, sixth or fourteenth amendments to the Constitution of the United States; that his conviction was had by due process of law, and that he had not been denied the equal protection of the laws.

XXIV.

HOW MUST A FEDERAL QUESTION BE MADE?

In the case of Columbia W. Power Company v. Columbia Street R. L. & P. Company, 172 U. S., 485 (43-525), the Court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a State court may be re-examined here:

(1.) "'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the *United States,* and the decision is *against* their validity.

(2.) "'Where is drawn in *question the validity of a statute of,* or an *authority exercised* under, any *State* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is *in favor of* their validity.

(3.) "'Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege or immunity, *specially set up and claimed* by either party under such Constitution, statute, commission or authority.'

"There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this Court jurisdiction. (Spies v. Illinois, 123 U. S., 131.)

"But where the validity of a treaty or statute of the United States is raised and the decision is against it, *or the validity of a State statute is drawn in question,* and the *decision is in favor of its validity,* this Court has repeatedly held that if the Federal question appears on the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

Miller v. Nicholls, 4 Wheat., 311 (4-578).

In Harding v. Illinois, volume 25, No. 5, Supreme Court Reporter, 176, decided by this Honorable Court, Decem-

ber 19, 1904, the Court, by Mr. Justice Day, in reviewing this question said:

> "In the petition for allowance of a writ of error, and the assignment of errors in this Court, it is alleged that the supreme court of the State erred in holding that the constitutional objection had been waived. And the plaintiff in error appears to have put upon file here, without leave, the briefs and petition for rehearing below, in which it is insisted there is sufficient to show that the constitutional objection was not abandoned. But neither the petition for a rehearing or petition for writ of error in the State court after judgment or assignment of error in this Court *can supply deficiencies in the record of the State court, if any exist.* * * * Nor does the certification of the briefs by the clerk of the State Supreme Court, which are no part of the record, help the matter. * * * *We are to try the case upon the duly certified record, legally made in the State court, and upon which its decision rests.*"

The sixth reason assigned by the plaintiff in error in his motion and petition for rehearing is as follows:

> "6. He says that section 281 of the Criminal Code of Practice of the State of Kentucky, which reads as follows:
>
> "'Section 281. *What not subject to exception—The* decisions of the Court upon challenges to the panel (a) and for cause (b) upon motions to set aside an indictment (c) and upon motions for a new trial (d) shall not be subject to exception,'
>
> "is in conflict with the rights of the defendant under the Constitution of the United States as well as the Constitution of Kentucky and the common law obtaining in this State, and more especially in violation of sections 5, 6 and 14 of said Constitution of the United States, because same deprives the defendant of the right of exception upon challenges to the panel and for cause, upon the selection of a jury in a case of felony."

By this reason plaintiff in error says that section 281 of the Kentucky Criminal Code deprived him of *the right of exception* upon the challenges to the panel and for cause, upon the selection of the jury that tried him; that said section is in conflict with his rights under the Federal and the State Constitutions; his common law rights, and especially his rights under the 5th, 6th and 14th amendments.

We have, in our stumbling way, vainly looked into the Federal and the State Constitutions for a provision in either, whereby the right of exception to the decision of the trial court upon a challenge to the panel or for cause is secured to the accused; nor have we been able to find where at common law such right was secured, or what Court existed at common law to review such decision of the trial court.

It is the contention of the Commonwealth that section 281 of the Criminal Code of Kentucky is not in conflict with either the Federal or the State Constitutions, or with any provisions of either; that it is not in derogation of any right of plaintiff in error, at common law, and the construction and interpretation of the same by the Kentucky Court of Appeals does not deprive plaintiff in error of any right under any of said instruments.

XXV.

JURISDICTION OVER THE JUDGMENTS OF UNITED STATES COURTS AND STATE COURTS DIFFERENT.

The jurisdiction of the Supreme Court to review a judgment of conviction in the courts of the United States and in the courts of a territory, as in the case of Hopt v. Utah, supra, and the jurisdiction of said Court to re-

view a judgment of conviction on a writ of error to the highest State court, is widely different. In the former, the Supreme Court has jurisdiction to review any error, and reverse for same, while in the latter, said Court has no jurisdiction in the absence of a Federal question, and can only review such question.

Davis v. Texas, 139 U. S., 651 (35-303).

Jacobi v. Alabama, 187 U. S., 134 (47-107).

Howard v. North Carolina, Advance Sheet of S. C. R., volume 24, No. 2, page 49 (decided Nov. 16, 1903).

In Davis v. State of Texas, 139 U. S., 139 (35-303), wherein the Code of Texas was attacked as being invalid, the Court said:

> "In Culton v. Utah, 130 U. S., 83, we held that where the Code of Utah provided that imprisonment at hard labor in the penitentiary for life might be substituted for the penalty of death when the accused was found guilty of murder in the first degree, if the jury made a recommendation to that effect, the Court erred in not calling the attention of the jury to that provision of the statute, since it was not to be presumed that they were aware of their right to make such a recommendation; *but that was a case which came directly to us from the supreme court of the territory, and the inquiry related to the commission of mere error, and statutory provisions like those of Texas were not under consideration.* A writ of error *to review the judgment of the highest tribunal of a State stands on far different ground, and can not be maintained in the absence of a Federal question giving us jurisdiction.* The State courts rendered no decision in favor of the validity of a statute of, or authority exercised under, the State, drawn in question on the ground of repugnancy to the laws of the United States, nor was any title, right, privilege or immunity under such Constitution or statute specially set up or claimed in the case. *It is not within our province to pass upon any of the questions sought*

to be presented, as they fall entirely within the scope of the exercise of the powers of the State."
Jacobi v. Alabama, 187 U. S., 107.
Howard v. N. C., volume 24, No. 2, page 49, Sup. Court Reporter, cited above, and quoted.

XXVI.

DUE PROCESS OF LAW.

Due process of law in the States is that administration of justice therein which exists and is regulated by the laws thereof.

If the laws of Kentucky are not in conflict with, nor repugnant to the Constitution of the United States, nor the laws thereof, nor any treaty thereof, then there can be no legislative discrimination against the plaintiff in error, and unless there was judicial discrimination by the trial court of Kentucky against him, his conviction thereunder was, and is, due process of law.

At common law no right of appeal existed in capital cases. No right of appeal existed under the laws of Kentucky, in such cases, prior to 1854; this right of appeal was given upon certain terms and with certain limitations, and the same statute which gave the right to appeal, withheld jurisdiction from the Appellate Court to review, and denied to the accused the right to except to, or have reviewed, any decision of the Court set out in section 281 of the Criminal Code of Kentucky.

Will the distinguished counsel for plaintiff in error point out wherein said section 281 is in conflict with, or repugnant to, the Federal Constitution, any law of the United States, or any treaty thereof? Or will he be so kind as to point out the provision of the State Constitution which is in conflict with this section of the Criminal

the grounds insufficient; the Legislature has not seen fit to give this Court the right to pass on that question."

XXI.

RULE OF CONSTRUCTION IN FEDERAL COURTS.

The construction of said section by the Kentucky Court of Appeals is the rule of construction in the Federal Courts of the United States, as will be seen from the following case:

In Smiley v. Kansas, Supreme Court Reporter, volume 25, No. 8,291, decided in the Supreme Court of the United States, February 20, 1905, the Court said:

> "It is well settled that in cases of this kind *the interpretation placed by the highest court of the State upon its statutes is conclusive here.*
>
> *"We accept the construction given to a State statute by that Court. * * * Nor is it material that the State court ascertains the meaning and scope of the statute as well as its validity, by pursuing a different rule of construction from that we recognize.* * *
>
> *"We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the chief justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined."*

The eighth error assigned by plaintiff in error in his motion and petition for rehearing is as follows:

> "8. He says that said section only relates to challenges made in felony cases in the selection of a jury in the presence of the defendant, and not to challenges made or heard either in the absence of

> said defendant or after the juror had been selected and accepted by both the Commonwealth and the defendant, but he says that in the event said section is construed by this Court to apply to said state of case, then, that same is in conflict with the Constitution of the United States and the common law operative in this State, as same deprives the defendant of his liberty without due process of law, and in violation of his right of trial by jury."

Plaintiff in error construes said section 281, to refer to challenges made in felony cases in the selection of jurors in the presence of the accused, and before the juror has been selected and accepted by both parties, and that the construction of said section which permits a juror to be challenged, *for good cause*, after he has been tested and accepted by both parties, but before the jury is sworn, is in conflict with the Federal Constitution and the common law operative in this State, and plaintiff was by said construction deprived of his liberty without due process of law, and in violation of his right of trial by jury.

Section 202, Criminal Code, provides:

> "It (challenge) must be taken before he is sworn in chief, unless the Court *for good cause*, permit it to be made at any time before the jury is completed."

Section 212, Criminal Code, provides that:

> "Challenges shall be tried and determined by the Court in a summary manner, without the issues of law or fact arising thereon being reduced to writing, except when the Court disallows a challenge for implied bias."

From the two sections of the Criminal Code of Kentucky copied above it will be seen that the trial court was authorized to discharge Alexander after he had been

tested and accepted by both parties, but before the jury was sworn. Said Court is vested with the judicial discretion to determine what will constitute *a good cause.*

We have been unable to find any provision of the Federal Constitution, or law of the United States, wherein a rule of construction and interpretation is provided for the State courts of Kentucky in construing a State statute; or wherein any limitation is placed on her courts in construing her laws, except they be brought, by such construction, in conflict with the Constitution or laws of the United States.

The construction of her laws by her courts will be adhered to by this Court, as will be seen from its decisions and the authorities cited.

XXII.

THE FEDERAL COURTS WILL FOLLOW THE INTERPRETATION AND CONSTRUCTION GIVEN THE STATE STATUTES BY THE HIGHEST COURT OF THE STATE, AS TO RIGHTS, PRIVILEGES AND IMMUNITIES, UNLESS SUCH CONSTRUCTION IS VIOLATIVE OF THE FEDERAL LAWS.

The highest State court of Kentucky has, since 1854, uniformly held that an accused on trial for a felony has no right, under section 281, Criminal Code, to except to the decision of the trial court upon a challenge to a juror for cause; and that the decision of the trial court is final and conclusive on said question, and not subject to review.

This Honorable Court recognizes said State decisions as binding on it, as will be seen from the following cases:

Leeper v. Texas, 139 U. S., 462 (35-225).
Nobles v. Georgia, 168 U. S., 398 (42-515).
Bergman v. Baecker, 157 U. S., 655 (59-848).
Fielden v. Illinois, 143 U. S., 452 (36-226).
Brown v. New Jersey, 175 U. S., 172 (44-119).

In Leeper v. U. S., 139 U. S., 462 (35-225), we quote from syllabus:

> "Whether statutes of a State have been duly enacted in accordance with the requirements of the Constitution of such State is not a Federal question and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States. * * *
>
> "The validity of the enactment of the Texas Codes is not open to inquiry in this Court."

Again in Nobles v. Georgia, 168 U. S., 399 (42-515), the Court said:

> "A construction of State statutes by the Court of last resort of the State will be followed by this Court."

In the case of Bergman v. Baecker, 157 U. S., 655 (39-848), was before the Court on a motion for writ of *habeas corpus*, this Court, after quoting many State court decisions, said:

> "In view of these decisions (State court) declaring the meaning and scope of the statutes under which the accused was prosecuted, it can not be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the 14th amendment of the Constitution of the United States."

In the case of Fielden v. State of Illinois, 143 U. S., 452 (36-226), in which plaintiff in error contended because the Supreme Court of Illinois permitted the amendment of a record in his case, at a time when he was not present, either in person or by counsel, that he was convicted without due process of law. This Court held that such action was not a denial of the equal protection of the law, and that it was in conformity with due process of law, and said:

> "We take, as is our duty, the laws of Illinois to be as declared by its highest court." * * *

In the case of Brown v. State of New Jersey, 175 U. S., 172 (44-119), the Court said:

> "The decision of the highest court of a State, that a statute is not in conflict with the Constitution of the State, is conclusive on Federal courts."

XXIII.

MOTION AND PETITION FOR REHEARING.

(R., 74 and 75.)

The plaintiff in error was charged with an offense against the criminal laws of Kentucky, and under the indictment, arrest and appearance of plaintiff in error the trial court had jurisdiction of the offense and the plaintiff in error; and unless this record presents a Federal question, which has been decided in the highest State court having jurisdiction of it, adversely to him, this writ of error must be dismissed by this Honorable Court; and if it does present a Federal question, unless the substantial rights of the accused were prejudiced thereby, it will affirm the judgment of the State court.

It is asserted by plaintiff in error that the opinion of the Court of Appeals of Kentucky is in conflict with the Federal and State Constitutions as well as the statutes of the State of Kentucky. The able counsel for plaintiff in error has not cited us to either the Federal or State constitutional provision which the Kentucky Court of Appeals disregarded or ignored, nor has he cited us to the statute of said State which is in conflict with said opinion.

It is also claimed that said opinion is in conflict with, and in derogation of, the common law, operative in said State.

At common law one convicted of a felony had no right of appeal. Under the Criminal Code of Kentucky he may have the judgment of his conviction reviewed, but nothing more. How this *enlarged* right is in conflict with the common law, or in derogation thereof, or an opinion in review of his trial can be so, we would be glad for counsel to point out more definitely.

It is also claimed that said opinion is in violation of his rights under the Constitution of the United States, and especially under the 14th amendment thereof, because the ruling therein deprives him of his liberty without due process of law, and denies him the equal protection of the laws.

What right or rights specially set up in the State court does this opinion deprive him of, without due process of law, or wherein has said opinion denied to him the equal protection of the laws, and of which said Court had any jurisdiction to consider?

It is also claimed that said opinion is in violation of his rights as guaranteed him under the 5th and 6th amendments of the Constitution of the United States, because it deprives him of his liberty without due process of law.

may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion award execution or remand the same to the Court from which it was removed by the writ."

CONSTITUTION OF KENTUCKY (1850).

ARTICLE 4.

"Section 1. The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one Supreme Court (to be styled the Court of Appeals), the courts established by this Constitution, and such courts, inferior to the Supreme Court, as the General Assembly may, from time to time, erect and establish.

"Section 2. *The Court of Appeals shall have appellate jurisdiction* ONLY, which shall be co-extensive with the State, *under such restrictions and regulations,* not repugnant to this Constitution, as may from time to time, be prescribed by law."

REVISED STATUTES OF KENTUCKY (1852).

CHAPTER 27, ARTICLE 1, SECTION 1.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:* That the Court of Appeals shall have jurisdiction, by appeal or writ of error, in matters of law, from the final order, judgment or decree of any inferior Court, except as otherwise provided in this Chapter.

"No appeal shall lie unless where the order, judgment or decree relates to an office, franchise or freehold, or is against a divorce, if the matter in

controversy does not amount in value to one hundred dollars, exclusive of interest and costs.

"*No writ of error or appeal shall lie in cases of felony.*" * * *

CRIMINAL CODE (1854).

BILLS OF EXCEPTION.

"Section 274. *Upon the trial of criminal* or penal prosecution, *either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 275. The DECISIONS *of the Court upon challenges to the panel, and for cause, upon motions to set aside an indictment, and upon motions for a new trial,* SHALL NOT *be subject to exception.*

"Section 276. The *exception shall be shown upon the record, by a bill of exceptions,* prepared, settled and signed, as provided in the Code of Practice in civil cases."

APPEALS.

"Section 326. The *Court of Appeals shall have appellate jurisdiction in prosecutions for felonies, subject to the restrictions contained in this article.*

"Section 327. An appeal shall only be taken on a final judgment, except on behalf of the Commonwealth.

"Section 328. An appeal shall be taken by the defendant in the following manner only:

"1. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted on the record in the circuit court.

"2. The appeal shall only be allowed by a judge

of the Court of Appeals after an examination of a certified transcript of the complete record, and being thereupon satisfied that there are reasonable grounds for believing that errors to the prejudice of the defendant have been committed, for which the judgment should be reversed.

"3. The appeal is taken by lodging in the clerk's office of the Court of Appeals, within sixty days after the judgment, a certified transcript of the record, with the certificate of the allowance of the appeal indorsed on the transcript, under the signature of one of the judges of the Court of Appeals. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment.

"Section 329. If the judge of the Court of Appeals refuses an appeal, he shall indorse upon the record the words 'an appeal refused;' with his signature thereto, and forthwith transmit to the clerk of the the Court of Appeals a certificate of his refusal. After such refusal no appeal shall be taken, and if surreptitiously obtained afterwards, shall be immediately dismissed by the Court. * * *

"Section 333. A *judgment of conviction* shall only be *reversed* for the *following errors of law to the defendant's prejudice appearing on the record:*

"1. An error of the circuit court in admitting or rejecting evidence.

"2. An error in instructing or in refusing to instruct the jury.

"3. An error in failing to arrest the judgment.

"4. An error in allowing or disallowing a peremptory challenge."

PRESENT CONSTITUTION OF KENTUCKY.

"Section 7. *Trial by Jury Inviolate*—The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

"Section 11. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.

"Section 109. The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a Court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution.

"Section 110. The *Court of Appeals shall have appellate jurisdiction only*, which shall be co-extensive with the State, under such restrictions and regulations not repugnant to this Constitution, *as may from time to time be prescribed by law*. Said Court shall have the power to issue such writs as may be necessary to give it a general control of inferior jurisdiction.

"Section 233. All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, *nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly.*"

PROVISIONS OF CRIMINAL CODE OF PRACTICE.

"Section 171. *Demurrer Overruled, Defendant may Plead*—If the demurrer be overruled, the defendant has the right to plead to the indictment; if he fail to do so, final judgment shall be entered against him, and, if necessary, a jury impanneled to fix the punishment.

"Section 172. *Pleas that may be Entered*—There are but three kinds of pleas to an indictment:

"1. A plea of guilty.

"2. Not guilty.

"3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty.

"Section 173. *Plea of Guilty must be by Defendant in Person*—The plea of guilty can only be entered by the defendant himself in open Court.

"Section 174. *Plea of Guilty may be Withdrawn*—At any time before judgment the Court may permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

"Section 175. *Effect of Plea of not Guilty*—The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending

to establish a defense, other than a former conviction or acquittal, may be given in evidence under it.

"Section 183. *Defendant on Trial for Felony must be Present—Bail*—If the indictment be for a felony, the defendant must be present, and shall remain in actual custody during the trial; unless his bail appear personally in Court, and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury. *If he escape from custody after the trial has commenced, the trial may either be stopped or progress to a verdict,* at the discretion of the Commonwealth's attorney; but judgment shall not be rendered until the presence of the defendant is obtained.

"Section 192. *Panel—How Filled*—When a juror is excused or a challenge to a juror is sustained the clerk shall draw the name of another juror to fill the panel until the list of standing jurors is exhausted, when the Court shall order such a number of qualified jurors as it shall deem sufficient to complete the jury to be summoned by the sheriff, and the panel shall be filled from time to time from the jurors so summoned, and if they be exhausted, similar orders may be made for summoning other jurors, until the jury is completed.

"Section 193. *Court may Appoint Person to Summon Jury*—The Court may, for sufficient cause, designate some other officer or person than the sheriff to summon petit jurors, the officer or person designated being first duly sworn in open Court to discharge the duty faithfully and impartially.

"Section 194. *Jurors may be Summoned from Adjoining County*—If the judge of the Court be satisfied, after having made a fair effort, *in good*

faith, for that purpose, that, from any cause, it will be impracticable to obtain a jury free from bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest probability of obtaining impartial jurors, and from those so summoned the jury may be formed.

"Section 199. *Grounds of Challenge to Panel*—A challenge to the panel shall only be for a substantial irregularity, in selecting or summoning the jury, or in drawing the panel by the clerk.

"Section 201. *Challenge to Juror Peremptory or for Cause*—The challenge to the juror is either:

"1. Peremptory; or,

"2. For cause.

"Section 202. *Must be Made before Juror Sworn in Chief, unless by Leave*—It must be taken before he is sworn in chief, *unless the Court, for good cause, permit it to be made at any time before the jury is completed.*

"Section 203. *Peremptory Challenges Allowed Defendant*—The defendant is entitled to fifteen peremptory challenges in prosecutions for felony, and three in prosecutions for misdemeanor.

"Section 204. *Peremptory Challenges Allowed Commonwealth*—The Commonwealth shall be entitled to five peremptory challenges in prosecutions for felony, and to three in prosecutions for misdemeanor.

"Section 205. *Either Party may Challenge for Cause*—The challenge for cause may be taken either by the Commonwealth or the defendant.

"Section 206. *Challenge may be General or Particular*—It may be general, that the juror is disqualified from serving in any case, or particular. that he is disqualified from serving in the case on trial.

"Section 207. *Causes of General Challenge—Newspaper Accounts and Rumors*—Causes of general challenge are:

"1. Want of qualifications prescribed in the Kentucky Statutes.

"2. A conviction for a felony.

"Unsoundness of mind, or such a defect in the faculties of the minds or organs of the body as render him incapable of properly performing the duties of a juror. It shall not be cause of challenge that a juror has read in the newspaper an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence: *And provided further,* That in the trial of any criminal case the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the Court shall be satisfied of the truth of such statement.

"Section 208. *Particular Causes of Challenge*—Particular causes of challenge are actual and implied bias.

"Section 209. *Actual Bias Defined*—Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case, or to either party,

Code? The 14th amendment grants no new right; it only protects the plaintiff in error in his existing rights, held under State law from impairment without due process of law.

In Hurtado v. People, 110 U. S., 516 (28-237), Justice Matthews in defining due process of law under the 14th amendment, said:

> "It refers to that law of the land, in each State, which derives its authority from the inherent and reserved powers of the State, exercised within those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure."

Section 281 of the Criminal Code of Kentucky not being in conflict with the Constitution, laws nor treaties of the United States, it follows, so long as the construction and interpretation of said section by the courts of Kentucky do not bring it within such conflict: *although such decision may be erroneous, its enforcement does not deprive the plaintiff in error of any right under either the State or Federal Constitutions, and is "due process of law."*

Section 281 of the Criminal Code of Kentucky was in force, and its interpretation settled by the Courts of Kentucky, before the adoption of the 14th amendment to the Federal Constitution, and the construction given it in the case of plaintiff in error was then, as now, due process of law.

In Anderson v. Henry, 45 W. Va., 319, the Court said of the 14th amendment:

> "It does not overthrow State laws, rights and remedies to the extent and purposes for which it is often cited. It respects the common law, the statute

> law, the remedies and proceedings existing in the State at its adoption. It came to preserve, not to destroy, existing rights."

The 14th amendment gives the Federal Government the power to enforce "due process of law" against arbitrary and unwarranted State actions, and nothing more.

In Hurtado v. California, 110 U. S., 516 (28-237), the Court said:

> "A trial by jury in suits at common law pending in *State courts,* is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the 14th amendment to abridge. A State can not deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to a settled course of judicial proceeding. *Due process of law is process according to the law of the land. This process in the States is regulated by the laws of the States.*"

In Kennedy v. Commonwealth, 14 Bush, 340, the Kentucky Court of Appeals in construing section 340 of the Criminal Code, as amended by Act of 1880, with reference to section 281, said:

> "We have no power to look into a bill of exceptions which the Legislature has declared should not be allowed, or into a general bill for matters not the subjects of exceptions, and then to reverse for an alleged error thus improperly appearing in the transcript. We must reverse for any error of law appearing in the record to the prejudice of appellant, but this only applies to such errors as the party had the right to manifest by bill of exceptions; and as a bill of exceptions, not only not authorized, but expressly forbidden by law, is no part of the record, an error in respect to any matters which, under sec-

tion 281, can not be excepted to, is not an error appearing *in the record* within the meaning of section 340."

This shows that the construction of said section, in the case of plaintiff in error, is the same general, usual and proper construction of said section by the courts of the Commonwealth since its adoption in 1854, and that he has been given the equal protection of the law, and his conviction was had by due process of law.

Does the due process of law prescribed by the 14th amendment, or the equal protection of the law defined therein, require of the State courts that in all criminal prosecutions therein, the accused shall be heard by himself and counsel, when he does not want to be heard; or that he shall stay in the courtroom and face the witnesses when he is willing to waive his presence; or that he shall be compelled to take out compulsory process for his witnesses; or may he not, as did plaintiff in error, waive a speedy, public trial; or may he not waive his presence when the trial judge asks a juror a question, either before or after the jury is sworn *without impairing any right secured to him by said amendment?*

Or does it require the State courts to interpret and construe its criminal laws so as to suit the taste of the accused?

These constitutional and statutory rights and privileges must not be denied to an accused on trial in the State court when he demands and asserts his rights thereto; but he is not compelled to assert them, and as held by many courts, he may waive them.

The courts of Kentucky have so held in many cases, and have never insisted on a literal compliance therewith, as will be seen from the cases cited herein.

EQUAL PROTECTION OF THE LAW.

From the State decisions of the Kentucky Court of Appeals cited elsewhere in this brief, it will be seen that the construction and interpretation of section 281 of the Criminal Code of Kentucky in this case, is the same construction and interpretation which has been given by her courts to said section in the trials of others charged with like offenses, since 1854.

That the decisions of the trial court upon challenges to the panel and to a juror for cause, are not subject to exception or review, and are final, is a consistent and uniform rule in the administration of the criminal laws of Kentucky; that, while the plaintiff in error is denied the right to except to such decisions of the trial court, and the Kentucky Court of Appeals is without jurisdiction to review, it is the same law that governs the trial of any and all accused of a violation of her criminal laws, and is therefore the equal protection of the law.

We ask that the judgment of the State court be affirmed, or this writ of error dismissed.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

APPENDIX.

CONSTITUTION OF UNITED STATES.

FIFTH AMENDMENT.

"*Criminal Proceedings Regulated—Private Property Protected*—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT.

"*Trial by Jury in Criminal Cases—Regulation of*—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT.

"Section 1. *Citizens—Who are—State no Power to Abridge Rights of*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

"Section 5. *Congress to Enforce this Article*—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

UNITED STATES COMPILED STATUTES (1901).

"Section 709. (As amended 1875). *Judgments and Decrees of State Courts on Writ of Error—A final judgment* or decree in any suit *in the highest Court of a State, in which a decision in the suit could be had,* where is drawn in question the validity of a treaty or Statute of, or an authority exercised under, the United States, and the decision is against their validity; *or where is drawn in question the validity of a Statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution,* treaties, or *laws of the United States, and the decision is in favor of their validity;* or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority,

FILE COPY.

No. 77.

Supreme Court of the United States.

OCTOBER TERM, 1904.

Supreme Court U. S.
FILED
OCT 9 1905
JAMES H. McKENNEY,
Clerk.

JAMES B. HOWARD, ... Plaintiff in Error,

versus

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Motion of Commonwealth to advance; statement and notice to Plaintiff in Error.

N. B. HAYS,
Attorney General.

CHARLES H. MORRIS,
Of Counsel.

Geo. A. Lewis Publishing House Print.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS MOTION TO ADVANCE.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

Comes now the defendant in error, The Commonwealth of Kentucky, and moves the Court to advance this case,, under United States Compiled Statutes, 1901, Section 710, and Rule 26, section 3 and 6; and that same be assigned for oral argument.

N. B. HAYS,
Attorney General of the
Commonwealth of Kentucky.

CHARLES MORRIS,
Of Counsel.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, Defendant in Error.

STATEMENT.

The Writ of Error herein is to review a decision and judgment of the Kentucky Court of Appeals, affirming a conviction of the plaintiff in error, James B. Howard, for the murder of Hon. William Goebel, under and in pursuance to the Criminal Laws of the State of Kentucky, as follows:

1. Because plaintiff in error was, on April 17th, 1900, indicted by the Grand Jury of Franklin County, Kentucky, for the willful murder of Hon. William Goebel. He was tried and convicted on said charge in the year 1900, the jury having fixed his punishment at death. (Howard v. Commonwealth 110 Ky., 356.)

On appeal to the Kentucky Court of Appeals the judgment of conviction was reversed and he was given a new trial.

He was tried and convicted on said charge for the

second time in 1902, his punishment having been fixed by the jury at confinement in the penitentiary for life. (Howard v. Commonwealth, 114 Ky., 372.)

On appeal to the Kentucky Court of Appeals, this judgment was likewise reversed and he was given a new trial.

He was tried and convicted on said charge for the third time in April, 1903. This judgment having been affirmed by the Kentucky Court of Appeals, he now asks this Honorable Court, by writ of error to review the same.

2. Because we believe an inspection of the record will show the writ of error is merely for delay.

The Commonwealth of Kentucky, defendant in error, for the reasons set out herein, moves this Honorable Court to advance the case, and that it be assigned for oral argument to the earliest day convenient for the Court.

N. B. HAYS,
Attorney General for the
Commonwealth of Kentucky.

CHARLES MORRIS,
Of Counsel.

Supreme Court of the United States.

JAMES B. HOWARD, Plaintiff in Error,

VERSUS NOTICE.

COMMONWEALTH OF KENTUCKY, Defendant in Error.

To James B. Howard:

Please take notice that on the 9th day of October, 1905, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, at motion hour, in the Court Room of said Court, Washington, D. C., for the decision of the Court thereon.

Annexed hereto is a copy of my statement or argument in support of said motion.

N. B. HAYS,
Attorney General of the
Commonwealth of Kentucky.

as satisfies the Court, in the exercise of a sound discretion, that he can not try the case impartially and without prejudice to the substantial rights of the parties challenging.

"Section 210. *Implied Bias—What is*—A challenge for implied bias may be made:

"1. If the juror be related by consanguinity, or affinity, or stand in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or be a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.

"2. If he be adverse to the defendant in a civil suit, or have complained against or been accused by him in a criminal prosecution.

"3. If he have served on the grand jury which found the indictment, or on the coroner's jury which inquired into the death of the party whose death is the subject of the indictment.

"4. If he have served on a trial jury which has tried another person for the offense charged in the indictment.

"5. If he have been one of a former jury sworn to try the same indictment, and whose verdict was set aside, or who were discharged without a verdict.

"6. If he have served as a juror in a civil action brought against the defendant for the act charged in the indictment.

"7. When the offense is punishable with death, if he entertain such conscientious opinions as would preclude him from finding the defendant guilty.

"Section 211. *Exemption from Service no Ground for Challenge*—An exemption from serving on a jury is not a cause of challenge.

"Section 212. *Challenge Tried by Court—How Determined—Challenges shall be tried and determined by the Court in a summary manner, without the issues of law or fact arising thereon being reduced to writing*, except when the Court disallows a challenge for implied bias.

"Section 213. *The Juror may be Examined on Challenge*—The juror may be examined on oath by either party, upon the challenge.

"Section 214. *Other Witnesses may be Examined*—Other witnesses may also be examined and their attendance coerced.

"Section 215. *Commonwealth to Challenge First—Practice*—The challenges to the juror shall first be made by the Commonwealth, and then by the defendant, and each party must exhaust his challenges to each juror before the other begins.

"Section 216. *Order of challenges*—The challenges of either party need not be taken all at once, but separately, in the following order:

"1. To the panel.

"2. To the juror for general disqualification.

"3. To the juror for implied bias.

"4. To the juror for actual bias.

"5. Peremptory.

"Section 229. *Defendant to Remain in Custody During Felony Trial*—During the trial of an indictment for felony the defendant shall be committed to and remain in the custody of the proper officer.

"Section 236. *View of Place offense Committed*—When, in the opinion of the Court, it is necessary that the jury should view the place in which the offense is charged to have been committed, or in which

any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers (and accompanied by the judge, prisoner and counsel for each side) to the place, which must be shown to them by the judge, or by a person appointed by the Court for that purpose. The officers must be sworn to suffer no person to speak to, or communicate with, the jury on any subject connected with the trial nor do so themselves, but shall merely show the place to be viewed, and return them into Court without unnecessary delay, or at a specified time.

"Section 250. *Sickness of a Juror Before Jury Completed*—If, after a juror has been accepted, but before the jury has been completed, one of the accepted jurors becomes so sick as to prevent the continuance of his duty, the Court may excuse such juror, and complete the formation of the jury as if he had not been orginally accepted.

"Section 251. *Discharge of Jury—Sickness of Juror*—If, after retirement, one of the jurors become so sick as to prevent the continuance of his duty, or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the Court seems proper, they do not agree in a verdict, and it satisfactorily appear that there is no probability they can agree, the Court may discharge the jury; or if the sickness of the juror be temporary, the Court may permit him to separate from the other jurors, and may place him in charge of an officer or not, in its discretion.

"Section 280. *Decisions Subject to Exception—Upon the trial of criminal* or penal *prosecutions, either party may except to any decision of the Court by which the substantial rights of such party are prejudiced, subject to the restrictions in the next section.*

"Section 281. *Decisions not Subject to Exception* —The *decisions of the Court upon challenges to the panel*, and *for cause*, upon *motions to set aside an indictment*, and upon *motions for a new trial, shall not to be subject to exception.*

"Section 282. *Exception Noted of Record—Preparation of Bill*—The *exception shall be shown upon the record by a bill of exceptions, prepared, settled and signed, as provided in the Code of Practice in civil cases.*

"Section 340. *Errors that Authorize Reversal of Judgment of Conviction*—A judgment of conviction shall be reversed for any error of law appearing on the record, when, upon consideration of the whole case, the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

CIVIL CODE OF PRACTICE.

"Section 333. 1. An exception is an objection to a decision of the Court upon a matter of law.

"2. *A party may, without a previous objection, except to a decision against him, unless it be made at the instance of the adverse party.*

"3. *But a party can not except to a decision made at the instance of the adverse party, unless objection shall have been made to the motion, offer or request of the adverse party.*

"Section 334. The *party objecting must except when the decision is made;* and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term to be fixed by the Court."